

No. 10943

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN MATEO FEED & FUEL COMPANY, a
Corporation, and H. E. CASEY COMPANY,
a co-partnership,

Appellants,

vs.

G. S. HAYWARD, as Trustee in the Matter of
Joseph Louis Scardino, Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,

Southern Division

FILED

FEB 16 1945

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of Joseph Louis Scardino	10
Answer of H. E. Casey Company to Trustee's Petition for Turnover Order	23
Answer of San Mateo Feed & Fuel Co., a Cor- poration, to Trustee's Petition for Turnover Order	20
Appeal:	
Appellee's Designation of Additional Por- tions of the Record on, Under Rule 75(a)	258
Bond on	252
Certificate of Clerk to Transcript of Rec- ord on	259
Concise Statement of Points to be Relied upon by Appellants on, Under Rule 19(6) (CCA)	261
Designation of Contents of Record on, Under Rule 75(a)	255
Notice of, to Circuit Court of Appeals, Un- der Rule 73(b)	251
Appellee's Designation of Additional Portions of the Record on Appeal Under Rule 75(a) .	258

Index	Page
Bond on Appeal	252
Certificate and Report of Referee on Petition for Review Filed on Behalf of San Mateo Feed and Fuel Co. on Feb. 26, 1944.....	58
Discussion by and Opinion of Referee....	231
Hearing April 12, 1943:	
Witnesses for the Trustee:	
Casey, Harold E.	
—direct	81
—cross	108
—redirect	114
—recross	117
—recalled, direct	129
—cross	130
Ferris, George	
—direct	119
—cross	126
—redirect	127
Scardino, Joseph L.	
—direct	65
—cross	74
—redirect	79
Hearing November 22, 1943:	
Witnesses for the Respondents:	
Culligan, Thomas J. Jr.	
—direct	184
—cross	189
—redirect	195
—recross	195

Index

Page

Hearing November 22, 1943—(Continued)

Witnesses for the Respondents—(Cont'd.)

Damonte, John J.

—direct 204

—cross 209

Mindnich, Jules

—direct 216

—cross 217

Witnesses for the Trustee:

Scardino, Joseph L.

—direct 143

—cross 150

—redirect 156

—recross 158

—redirect 160

—recross 172

—redirect 178

Certificate and Report of Referee on Petition
for Review of Referee's Order of September
15, 1943 3

Certificate of Clerk to Transcript of Record
on Appeal 259

Concise Statement of Points to be Relied upon
by Appellants on Appeal Under Rule 19(6)
(CCA) 261

Designation of Contents of Record on Appeal
Under Rule 75(a) 255

Discussion by and Opinion of Referee. 14

Index	Page
Examination Under 21(a)	30
Exhibit for Trustee:	
No. 1—Letter of Assignment, Dated February 20, 1942, to Conway & Culligan from J. L. Scardino.....	48
Witnesses for the Trustee:	
Casey, Harold E.	30
Scardino, Joseph L.	50
General Examination	28
Witness for the Bankrupt:	
Scardino, Joseph L.	28
Minute Order dated Oct. 4, 1943, Order of Re- reference on Petition for Review	57
Names and Addresses of Attorney	1
Notice of Appeal to Circuit Court of Appeals Under Rule 73(b)	251
Notice of Further Hearing of Trustee's Peti- tion for a Turnover Order	234
Order Confirming Proceedings and Findings of Referee	250
Order Directing San Mateo Feed and Fuel Co. and H. E. Casey Company to Turn Over Certain Moneys to Trustee	235
Order of Adjudication and Reference, etc.....	2

Index

Page

Order on Petition of Trustee and Order to Show Cause Based Thereon	26
Order to Show Cause on Trustee's Petition for Turnover Order	19
Petition for Review	239
Exhibit "A"—Order Directing San Mateo Feed and Fuel Co. and H. E. Casey Company to Turn Over Certain Moneys to Trustee	245
Trustee's Petition for Turnover Order.....	16

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Attorney for Appellee

District Court of the United States
For the Northern District of California
Southern Division

No. 34909 S in Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

At San Francisco, in said District, on the 30th day of April, 1942.

The Petition of Joseph Louis Scardino filed on the 29th day of April, 1942, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered; and no opposition being made thereto

It Is Adjudged that the said Joseph Louis Scardino is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it hereby is referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act, and that the said Joseph Louis Scardino shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all

orders which the Court may direct to be published, be inserted in Burlingame "Advance-Star" a newspaper published in the County of San Mateo, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 30, 1942.

A. F. St. SURE
District Judge

[Endorsed]: Filed Apr. 30, 1942. [1*]

In the Southern Division of the United States
District Court for the Northern District
of California

No. 34909-S In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt

CERTIFICATE AND REPORT OF REFEREE
ON PETITION FOR REVIEW OF REF-
EREE'S ORDER OF SEPTEMBER 15, 1943

To Honorable A. F. St. Sure, United States Dis-
trict Judge for the Northern District of Cali-
fornia:

I, Burton J. Wyman, one of the referees in bank-

ruptcy of this court, and the referee in charge of this proceeding respectfully certify and report that:

This matter comes before the court on the following verified petition for review filed in the above entitled proceed- [2] ing by Max H. Margolis, Esq., on behalf of G. S. Hayward, the trustee of the estate of the above-named bankrupt:

“Now comes your petitioner G. S. Hayward and respectfully represents:

“That the above named Bankrupt filed his voluntary petition in Bankruptcy on April 29, 1942, and was duly adjudicated a Bankrupt by the above entitled court on April 30, 1942. That thereafter and on May 21, 1942, your petitioner was duly appointed Trustee of the estate and effects of said Bankrupt, and ever since said date she has been and now is the duly appointed, qualified and acting Trustee of the estate and effects of said Bankrupt.

“That on April 2, 1943, petitioner filed her duly verified petition for an Order to Show Cause to issue requiring the therein named Respondents H. E. Casey Company and San Mateo Feed & Fuel Co., to appear and show cause before said Referee in Bankruptcy, why an order should not be made directing said Respondents to turn over, to petitioner as such Trustee, certain money paid to them and each of them by the Bankrupt within four months of the filing of his petition in Bankruptcy, on the ground that said payments constituted voidable preferences. That said Respondents respectively filed their duly verified answers to Trustee's said petition and appeared pursuant to said Order to Show Cause before said Referee in Bankruptcy.

“That a hearing thereon was had on April 12, 1943, before said Referee in Bankruptcy and the matter was thereafter submitted on briefs filed in these proceedings. That said Referee in Bankruptcy on September 15, [3] 1943, made his Order denying the prayer in said petition, in the manner following:

“(Title of court and cause)

“ ‘ORDER ON PETITION OF TRUSTEE AND ORDER TO SHOW CAUSE BASED THEREON

“ ‘This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Company, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection therewith, and the court being fully advised in the premises, finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, trans-

ferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

“Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, [4] is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

“It, Therefore, Hereby Is Ordered, Adjudged And Decreed that the trustee’s said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee’s, within ten (10) days from date hereof, taking such further steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

Dated: September 15, 1943

BURTON J. WYMAN

Referee in Bankruptcy’

“That said order is erroneous and petitioner is aggrieved thereby in the following particulars:

“That to permit said order to stand would unjustly deprive Bankrupt’s remaining creditors of their fair and equitable share in the assets of his estate, and unjustly enrich Respondents.

“That there is sufficient testimony in the record to support a finding of the Bankrupt’s insolvency.

The record is replete with uncontradicted testimony showing facts and circumstances from which the court could and should have drawn the inference of the Bankrupt's insolvency at the times the several preferences were made to the Respondents. The manner in which the preferences were obtained, the activities of Respondents and their respective agents, and the information they and each of [5] them were in a position to ascertain and in fact did ascertain, all tend to support the Bankrupt's insolvency.

“To supplement and further support the fact of Bankrupt's insolvency, your petitioner respectfully makes the following offer of proof:

“Petitioner offers to prove:

“1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

“2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.

“3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

“4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said payments, Respondents knew they were obtaining preferences.

“That said offer of proof is supported by the affidavit of Joseph Louis Scardino, the Bankrupt herein, and the same is hereto attached and made a part hereof.

“It is respectfully urged that these proceedings be certified to the United States District Court Judge, as in such cases made and provided, for a consideration of said order and the same be reversed, or in the event said United States District Court Judge should, under all of the facts and circumstances contained in the record and upon the consideration of those herein set forth, deem it proper in the premises that this matter be remanded to the Referee, then the record herein and the proceeding thereunder be returned to said Referee with instructions to take such further and other proceedings in accordance with Section 2.a(10) of the Bankruptcy Act, as may be proper in the premises.

“Wherefore, your petitioner prays for a review of said Order by the United States District Court Judge, and upon the consideration thereof, said Order be reversed, or should it appear to said United States District Court Judge that this matter is within the purview of Section 2.a(10) of the

Bankruptcy Act, and should said Judge deem it proper, then the record herein be returned to the Referee with instructions for further proceedings as may be appropriate in the premises, and for such other and further order for which no previous application has been made.

“G. S. HAYWARD

“Petitioner

“MAX H. MARGOLIS

“Attorney for Petitioner [7]

“United States of America

“Northern District of California

“City and County of San Francisco—ss.

“G. S. Hayward, being first duly sworn, deposes and says:

“That she is the petitioner named and described in the foregoing petition; that she has read the petition, knows the contents thereof and hereby makes solemn oath that the statements contained therein are true to the best of her knowledge, information and belief.

“G. S. HAYWARD

“Subscribed And Sworn to before me this 24th day of September, 1943.

“BURTON J. WYMAN

“Referee in Bankruptcy

“MAX H. MARGOLIS

1650 Russ Building

SU tter 3866

San Francisco, California

“Attorney for Trustee [8]

“In the Southern Division of The United States District Court, for the Northern District of California.

No. 34909-S—In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt.

“AFFIDAVIT OF JOSEPH LOUIS SCARDINO

“United States of America

“Northern District of California

“City and County of San Francisco—ss.

“Joseph Louis Scardino, being first duly sworn, deposes and says:

“That I am the person named and described in the above entitled proceedings; that I filed my duly verified, voluntary petition herein on April 29, 1942, and was duly adjudicated a bankrupt by the above entitled Court on April 30, 1942.

“That for many months prior to February 16, 1942, my business as a plaster-contractor was steadily getting worse and a short time prior to that date, I called upon my attorney for counsel and advice regarding my general business affairs and the pressure being exerted upon me by several of my creditors, discussed with him the matters covering certain tax liabilities and the possible filing of a voluntary petition in bankruptcy, and left with him for inspection whatever books, records, papers and documents I then had, a portion of which had theretofore been placed for safe keeping in a friend's gar-

age under lock and key and when the door of the same was inadvertantly left unlocked said portion of said records were chewed up, mutilated and destroyed by a dog. That my attorney prepared my said voluntary petition and the accompanying schedules which I verified under oath on said February 16, 1942, and the same were duly filed as aforesaid on April 29, 1942. That for some time prior to said February 16, 1942, and up to and including said April 29, 1942, my attorney conducted negotiations with creditors to whom I was indebted for wage claims and with other creditors to whom I was, and continued [9] to be indebted for various taxes, all tending toward the settlement and liquidation of the same but without effect.

“That during the conferences had with my attorney, and within four (4) months of the filing of my said petition, I informed him that I was being hard pressed by certain of my general creditors and was requested to and did make substantial payments to H. E. Casey and Company, and San Mateo Feed & Fuel Co., also that they and each of them requested me to execute certain assignments conveying mon-ey-s due to me from one of my general contractors, and when I informed him that by virtue of said assignments and the payments made to them, their respective claims would be paid in full, and that there might possibly be a credit coming to me, I was advised that their names need not be listed in my schedules among the unsecured creditors or otherwise.

“That within four (4) months of the filing of my

said petition, and more particularly between December 30, 1941 and March 12, 1942, inclusive, said San Mateo Feed & Fuel Co., received the total sum of \$1025.35 from me and from persons who were indebted to me in my operations as a plaster-contractor; and during said four (4) months period, and more particularly on or about January 20, 1942, and between February 18, 1942, and about March 14, 1942, said H. E. Casey and Company received the total sum of \$2534.76 from me and from persons who were likewise indebted to me in my operations as a plaster-contractor; that during said times and on each of said dates respectively, the total fair market value of all my property, both real and personal, not including the aforesaid amounts paid to said creditors, was not sufficient to pay all of my debts. That on each [10] of said dates the total of all my debts, exclusive of the amounts owed to said creditors herein named, was the approximate sum of \$3227.42. That on each of said dates the fair market value of all of my assets did not exceed the sum of \$850, made up of the following: an unimproved piece of real property located at 9th and Bayshore Highway, San Mateo, California, standing of record in my name and the name of my wife, Nettie Scardino, as joint tenants, the fair market value of which was \$250; a 1935 Chevrolet Truck. (1-1/2 Tons), the fair market value of which was \$150; cash on deposit with the Bank of America N. T. & S. A., San Mateo Branch, San Mateo, California, in the approximate sum of \$50, held under a writ of attachment which was levied more than four (4)

months prior to the filing of my said petition, and which was paid over to the State Compensation Insurance Fund on or about April 20, 1942, pursuant to a writ of execution issued out of the suit brought against me by said Fund; my tools, plaster boards, two water hoses, two hoes, mortar boards, mixing box, and mixed tools, the fair market value of which was \$400, and which I claimed exempt.

“That during said four (4) month period and for many months prior thereto the credit managers of both of said creditors called upon me frequently and I advised them of my insolvent condition. Notwithstanding, they arranged with my general contractors that all moneys which were due and owing to me should be paid by checks drawn payable to me and them respectively, all without my consent and against my wishes and instructions.

“That I ceased operating my business as a plaster-contractor during the latter part of January, 1942, due to my financial inability to carry on the same, and this [11] fact, was at the time, well known to both of said creditors. That for at least thirty (30) days prior to said latter part of January, 1942, one Bud Murray, connected with said San Mateo Feed & Fuel Co., called on me twice and three times weekly regarding payment of my account with his firm, and I repeatedly advised him of my financial condition and informed him that I intended to and did close my business in January, 1942.

“That at no time, nor upon any date, between December 30, 1941, and the date of the filing of my

petition in bankruptcy, on said April 29, 1942, was the aggregate of all of my property at its fair market value, exclusive of the sums conveyed to the two creditors as aforesaid, sufficient in amount to pay all of my debts outstanding as of said time or times, date or dates.

“JOSEPH LOUIS SCARDINO

“Subscribed And Sworn to before me this 23rd day of September, 1943.

“LOUIS WIENER

“Notary Public In and for the City and County of San Francisco, State of California.”

(See original of said petition, with exhibit attached thereto, and the original order of September 15, 1943, handed up herewith as a part of this certificate and report.)

DISCUSSION BY AND OPINION OF REFEREE

At the time I entered the complained-of order, I was of the opinion that, upon the evidence presented on April 12, 1943, [12] as such evidence is shown by the Reporter's Transcript, (handed up herewith as a part of this certificate and report), there was no order which legally I could enter other than the one dismissing the trustee's petition and discharging the order to show cause based on said petition. However, with the record in its present state—and I refer particularly to the affidavit of the bankrupt attached to the aforesaid petition for review—I am of the opinion that the court, in the interest of equity and justice, particularly, so far as creditors' rights are concerned, and also in the exercise of

sound discretion, is authorized by law to return the herein records, and the matters covered thereby, to me, as the referee in charge of these proceedings, with instructions to take such further proceedings as are warranted in the premises.

As legal justification for such procedure, see section 2a(10) of the Bankruptcy Act [11 USCA, §11a(10)].

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Trustee's Petition for Turnover Order and Order to Show Cause on Trustee's Petition for Turnover Order;

(2) Affidavit of Mailing Notice of Trustee's Petition for Turnover Order;

(3) Answer of San Mateo Feed & Fuel Co., a Corporation to Trustee's Petition for Turnover Order;

(4) Answer of H. E. Casey Company to Trustee's Petition for Turnover Order;

(5) Reporter's Transcript of Examination Under 21(a);

(6) Reporter's Transcript of Hearing on Trustee's Petition for a Turnover Order to Recover Preferences;

(7) Trustee's Memorandum on Petition for a Turnover [13] Order to Recover Preferences;

(8) Memorandum in Opposition to Trustee's Memorandum;

(9) Letter dated May 13th, 1943, from Hugh F. Mullin, Jr., Esq., Attorney for H. E. Casey Co.;

(10) Trustee's Closing Memorandum;

(11) Order on Petition of Trustee and Order to Show Cause Based Thereon;

(12) Petition for Review of Referee's Order by United States District Judge, and

(13) Affidavit of Mailing.

Dated: September 30th, 1943.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Sep. 30, 1943. [14]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR TURNOVER
ORDER

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

The petition of G. S. Hayward, respectfully represents:

That on April 29, 1942, the above named bankrupt filed his voluntary petition in bankruptcy herein, and on April 30, 1942 was duly and regularly adjudicated a bankrupt; that on May 21, 1942, petitioner was duly appointed Trustee of the estate and effects of the above named bankrupt, and thereafter duly qualified and presented the Bond, required of her as such Trustee, which was approved

by the Court; that ever since said May 21, 1942, petitioner has been and now is the duly qualified and acting Trustee in these proceedings.

That on said April 29, 1942, the day of the filing of [15] bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of moneys assigned to H. E. Casey Company, 835 Woodside Way, San Mateo, California, in the sum of \$2696.92, and moneys assigned to San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, in the sum of \$1279.47; that said assignments were made by said bankrupt to the respondents herein-above named within four (4) months of the filing of his petition in bankruptcy herein, without any consideration therefor, and petitioner alleges that upon the filing of bankrupt's said voluntary petition, said sums of \$2696.92 and \$1279.47, passed to the petitioner, as such Trustee herein, to be administered with the assets of this estate.

That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was insolvent and caused said bankrupt to make said assignments without any consideration therefor. That said moneys so received by said respondents are held by them without color of right or title thereto and petitioner alleges that she is entitled to the immediate possession of the same.

Wherefore, petitioner prays for an order requiring the said H. E. Casey Company and the said San Mateo Feed & Fuel Company to appear before the Honorable Burton J. Wyman, Referee In Bankruptcy, at his Courtroom, #609 Grant Building, 7th & Market Streets, San Francisco, California, on

a day and at a time certain to then and there show cause, if any they or each of them have, why they and each of them should not be ordered to turn over to petitioner, as such Trustee the respective sums of \$2696.92 and \$1279.47 held by them to be administered in these proceedings, and for such other and further relief as may be just and proper in the premises, for which no previous application has been made.

G. S. HAYWARD

Petitioner

MAX H. MARGOLIS

Attorney for Petitioner [16]

United States of America

Northern District of California

City and County of San Francisco—ss.

G. S. Hayward, being first duly sworn, deposes and says:

That she is the petitioner named and described in the foregoing petition; that she has read the petition, knows the contents thereof and hereby makes solemn oath that the statements contained therein are true to the best of her knowledge, information and belief.

G. S. HAYWARD

Subscribed and Sworn to before me this 2nd day of April, 1943.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed with Referee Apr. 2, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[17]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON TRUSTEE'S
PETITION FOR TURNOVER ORDER

Upon the reading, consideration and filing of the annexed verified petition of G. S. Hayward, Trustee of the estate of the above named bankrupt and upon all the proceedings heretofore had herein, and good cause appearing therefor,

It Is Hereby Ordered, that H. E. Casey Company 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, appear and show cause, if any they or each of them have, before the undersigned Referee in Bankruptcy at his Courtroom located at #609 Grant Building, 7th & Market Streets, San Francisco, California, on April 12th, 1943, at the hour of 2:00 P.M. of said day or as soon thereafter [18] as counsel may be heard, why they and each of them should not be ordered to turn over to the Trustee herein, the sums of \$2696.92, and \$1279.47 held by them respectively as more particularly described and referred to in said Trustee's verified petition;

It Is Further Ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee's verified petition, including all of the information regarding the Notices of Completion in connection with the receipt of said moneys under and by virtue of said assignments;

It Is Further Ordered, that service of this order and annexed petition be made upon said respondents, H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, by mailing copies thereof to said Respondents and to F. E. Hoffmann, Esq., attorney for said latter respondent, 220—3rd Avenue, San Mateo, California, on or before April 2nd, 1943, be deemed good and sufficient service and the time for said service is hereby shortened accordingly.

Dated: San Francisco, California, in said District; April 2nd, 1943.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed with Referee Apr. 2, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[19]

[Title of District Court and Cause.]

ANSWER OF SAN MATEO FEED & FUEL CO.,
A CORPORATION, TO TRUSTEE'S PETITION FOR TURNOVER ORDER

Now comes San Mateo Feed & Fuel Co., a California Corporation, and for answer to Trustee's Petition for Turnover Order, admits, denies and alleges as follows, to-wit:

Said Corporation denies that on April 29, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting

of monies assigned to San Mateo Feed & Fuel Co., a Corporation, in the sum of \$1279.47, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt's petition in bankruptcy, without any consideration therefor; denies that said alleged sum of \$1279.47 passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and in this connection alleges that on February 17, 1942, said bankrupt did make certain assignments to respondent herein of certain monies, which said monies were never paid to respondent pursuant [20] to said assignments; denies that said respondent received the money alleged to have been received in said petition, or any money at all pursuant to any assignments made by said bankrupt to respondent; denies that respondent holds any money received pursuant to any assignment; denies that the monies received by respondent from said bankrupt are held by it without color of right or title thereto; denies that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

Further answering said petition, respondent alleges that said bankrupt did pay certain money to respondent upon an open book account, but not pursuant to any assignment, and in this connection alleges that said payments were made by said bank-

rupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by said respondent, and for a valuable consideration.

Wherefore, respondent prays that petitioner's order requiring San Mateo Feed & Fuel Co., a corporation, to turn over to petitioner as trustee, the sum of \$1279.47 be denied, together with such other and further relief as to the court may seem proper.

SAN MATEO FEED & FUEL
CO., a corporation,

By GEO. FERRIS

Vice-president-Respondent

F. E. HOFFMANN

Attorney for Respondent.

[21]

State of California

County of San Mateo—ss.

Geo. Ferris, being duly sworn, deposes and says:

That he is an officer of respondent, San Mateo Feed & Fuel Co., a corporation, to-wit, the vice-president thereof; and makes this verification for and on behalf of said respondent; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information or belief, and as to such matters, that he believes it to be true.

GEO. FERRIS

Subscribed and sworn to before me this 9 day of April, 1943.

[Seal] F. E. HOFFMANN

Notary Public in and for the County of San Mateo, State of California.

[Endorsed]: Filed with Referee Apr. 10, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[22]

[Title of District Court and Cause.]

ANSWER OF H. E. CASEY COMPANY TO
TRUSTEE'S PETITION FOR TURNOVER
ORDER

Comes now H. E. Casey Company, a co-partnership, consisting of H. E. Casey and Angela E. Casey, and for answer to Trustee's Petition for Turnover Order, admits, denies and alleges as follows, to-wit:

Denies that on April 29th, 1942, the day of the filing of bankrupt's petition in bankruptcy herein, said bankrupt had assets consisting of monies assigned to H. E. Casey Company, a copartnership, in the sum of Two Thousand Six Hundred Ninety-six and 92/100 (\$2,696.92) Dollars, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt's petition in bankruptcy, without any consideration therefor; denies that said alleged sum of Two Thousand Six Hundred Ninety-six and 92/100 (\$2,696.92) Dollars

passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and [23] in this connection alleges that on February 20th, 1942, said bankrupt did make certain assignments to respondent herein for certain monies, which were due said bankrupt from Conway and Culligan, building contractors, and further alleges that said assignments were made in the ordinary course of business as conducted by this answering respondent and others dealing in the same type of business as respondent in the community in which respondent operates his said business; denies that respondent holds any money received pursuant to any assignment, save and except the sum of Two Thousand Thirty-five and 89/100 (\$2,035.89) Dollars; denies that the monies received by respondent from said bankrupt are held by respondent without color of right or title thereto, and in this respect alleges that said sums received by respondent by virtue of said assignments were received in the ordinary course of business of respondent, that there was consideration for said assignment, and further alleges that said bankrupt is indebted to respondent in the sum of One Thousand Thirty-one and 52/100 (\$1,031.52) Dollars as a balance due on an open book account; denies that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

Further answering said petition, respondent alleges that said bankrupt did pay certain monies to respondent upon an open book account, and that said payments were made by said bankrupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by respondent and for valuable consideration.

Wherefore, respondent prays that petitioner's order requiring H. E. Casey Company to turn over to petitioner, as Trustee, the sum of Two Thousand Six Hundred Ninety-six and 92/100 (\$2,696.92) Dollars be denied, together with such other and further relief as to the Court may seem proper.

H. E. CASEY COMPANY,
a co-partnership,

By H. E. CASEY

HUGH F. MULLIN, JR.

Attorney for Respondent [24]

State of California

County of San Mateo—ss.

H. E. Casey, being first duly sworn, deposes and says:

That he is one of the partners of H. E. Casey Company, a co-partnership, and that he makes this verification for and on behalf of said co-partnership; that he has read the foregoing Answer and knows the contents thereof, that the same is true of his own knowledge except as to matters therein

stated upon information or belief, and as to such matters he believes it to be true.

H. E. CASEY

Subscribed and sworn to before me this 12th day of April, 1943.

[Seal] HUGH F. MULLIN, JR.

Notary Public in and for the County of San Mateo,
State of California.

[Endorsed]: Filed with Referee Apr. 12, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[25]

[Title of District Court and Cause]

ORDER ON PETITION OF TRUSTEE AND
ORDER TO SHOW CAUSE BASED
THEREON

This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Company, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection

therewith, and the court being [26] fully advised in the premises, finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

It, Therefore, Hereby Is Ordered, Adjudged and Decreed that the trustee's said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee's, within ten (10) days from date hereof, taking such further steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

Dated: September 15, 1943.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed with Referee Sept. 15, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[Title of District Court and Cause.]

Thursday, May 21, 1942

General Examination

Appearances:

Renzo Turco, Esq.,

Attorney for Bankrupt. [31]

JOSEPH L. SCARDINO

Sworn.

The Referee: Q. Where do you live?

A. Menlo Park.

Q. What address? A. 1038 Curtis Street.

Q. What is your business?

A. Plaster contractor.

Q. Are you married? A. Yes.

Q. Your wife's name is what? A. Nettie.

Q. Did you ever file any other petition in bankruptcy? A. No, sir.

Q. Are you a citizen of the United States?

A. Yes.

Q. Do your schedules show the names of all of your creditors and the amounts due from you to them? A. Yes, sir.

Q. And do they show all of your assets, all of your property? A. Yes, sir.

Q. Is anybody holding any property in trust for you? A. No.

Q. Has anyone died and left you any money or other property? A. No, sir.

(Testimony of Joseph L. Scardino.)

Q. Did you have a bank account within a year preceding the filing of your petition in bankruptcy?

A. No, sir.

Q. Or did you have a safe deposit box within the same time? A. No, sir.

Q. Or within the same time have you transferred any real property, any land?

A. No, sir.

Q. Did you have any stocks, bonds, or securities of any kind whatsoever at the time you filed the petition in bankruptcy? A. No, sir.

Q. Or did you have any interest in any automobile at that time? A. No, sir.

Q. When was the last time you had an automobile? [32] A. The wife had one last year.

Q. She has not got it now? A. No.

Q. She did not have it when you filed the petition? A. No.

Q. Did you have any interest in the automobile?

A. No, I have not.

The Referee: Are there any creditors present who want to ask any questions? That is all. G. S. Hayward, Trustee, bond \$100.00.

(Witness excused.) [33]

Tuesday, January 26, 1942

Examination under 21 (a)

Appearances:

Max H. Margolis, Esq., Attorney for Trustee;
Julian Pardini, Esq., Attorney for Bankrupt;
John J. Daly, Esq., Assistant Attorney General,
State of California;

Esther B. Phillips, Assistant U. S. Attorney,
appearing for Collector of Internal Revenue.

Mr. Margolis: Subpenas, Your Honor, were issued on the San Mateo Feed and Fuel Company. Is there a representative of that company here?

The Referee: Apparently not.

Mr. Margolis: There is a return of service on file, Your Honor.

The Referee: Well, prepare a certificate of contempt.

Mr. Margolis: I will make certain first. Is Mr. George Ferris here, of the San Mateo Feed and Fuel Company?

Is Mr. Harold E. Casey here?

HAROLD E. CASEY

called for the Trustee; sworn:

Mr. Margolis: Q. Did you bring with you documents and papers in connection with any transactions had with Mr. Scardino?

A. I brought the ledger cards showing the dates requested, December.

Q. May I see them, please?

A. That is the original.

Q. Did you bring with you any paper or docu-

(Testimony of Harold E. Casey.)

ment indicating an assignment of any kind from Mr. Scardino to the Casey Company?

A. We have one here. [34]

Q. May I see it? Where is the original of this, do you know, Mr. Casey? A. That is it.

Q. I mean the one bearing Mr. Scardino's signature?

A. I don't know. That is all that is in the file. This was honored and paid.

Q. May I withdraw it from that file?

A. Yes.

Mr. Margolis: I will read this into the record, Your Honor:

“February 18, 1942

“Conway & Culligan
Monadnock Building,
San Francisco, California

Attention: Mr. T. J. Culligan, Jr.

“This will authorize you to pay to the H. E. Casey Company the balance due them for material on each job in the order in which it falls due. The amount of money I owe them is listed as follows:

Job No.	Amount
1172	\$ 28.64
1142	67.40
1149	204.97
1112	219.12
1139	31.21
1140	65.63
1143	42.22
1138	31.85

(Testimony of Harold E. Casey.)

1118	56.20
1141	7.43
1120	39.55
1136	60.40
1137	74.31
1131	191.05
1132	122.03
1133	119.71
1134	48.31
1130	200.29
1165	228.68
1129	180.82
1127	16.07

\$2,035.89

[35]

“All payments made to H. E. Casey Company to be credited to my account.

“Very truly yours,

.....
J. L. Scardino

445 Standish St.,

Redwood City, Calif.

Witness:.....”

Mr. Pardini: That is not signed, this particular document.

Mr. Margolis: This particular document is a copy. The date is February 18, 1942.

Q. Can you enlighten us on this document in any respect, Mr. Casey?

(Testimony of Harold E. Casey.)

A. Well, Conway and Culligan would have the original.

Q. Now, did you get other or additional assignments except this?

A. There is one of these. I have a couple of those. Whether or not that is an assignment, I don't know.

Q. Do your records indicate, Mr. Casey, that the sum total of \$2,035.89 was collected pursuant to the assignment I just read into the record?

A. I think, if I remember correctly, that was subject to an adjustment. What is the amount?

Q. \$2,035.89?

A. Well, I know it was paid through Conway and Culligan and credited to his account.

Q. Did you set up a separate account for the assignment? A. Yes.

Q. Do you have that there?

A. No, I have not got that one. It was probably in the Conway and Culligan file.

Q. Would this add any light to the inquiry? That is attached [36] to the letter of February 18, 1942?

A. Well, \$2,035.89. That is correct.

Q. \$2,035.89? A. Yes.

Q. Your records reveal you have received that sum of money subsequent to February 18, 1942?

A. Prior to?

Q. After? A. After, yes.

Q. Have you anything there which would show

(Testimony of Harold E. Casey.)

us when you first started to receive payments under this copy of the assignment, dated February 18, 1942?

A. My recollection is it was paid in one check.

Mr. Margolis: I would like the record to show at this time, that Miss Phillips is here, representing the United States Government in connection with the tax claim of the Internal Revenue Collector, and Mr. John J. Daly is representing the State of California, pursuant to a claim filed in this matter for unemployment insurance.

Q. Can you tell us the date you received that sum of \$2,035.89?

A. Not from the records I have here.

Q. Can we obtain the information, Mr. Casey?

A. I think we can.

Q. Would your records reveal the date?

A. They should.

Q. What is this you have handed me? It looks like a ledger card.

A. That is right.

Q. Would that indicate the receipt of that?

A. No. I was looking for it here, but I do not see it. It might be made up in—we might have credited it in small items to show as a job.

Q. Could you obtain that information by telephone in order to avoid the necessity of coming back?

A. I could tell if it was credited in this ledger card or [37] some other source.

Q. Have you that other source with you?

A. No.

(Testimony of Harold E. Casey.)

Q. Could you obtain it?

A. No, because they have not the credit side.

Mr. Pardini: Q. Where are the credits?

A. I would have to check back to see.

Mr. Margolis: Q. I was under the impression you said you got the \$2,035.89 in one lump sum payment?

A. That may be correct.

Q. But you allocated them?

A. We allocated them to the jobs, see.

Q. Wouldn't your deposit book, or any such record you may have at your office, show?

A. I might make this statement, that our office has been changed over two or three times, due to new help. I do not believe the ones there would know where to look.

Q. Can you tell us, Mr. Casey, how or in what manner that assignment was drawn?

A. In what way do you mean?

Q. Was that typed up in your office?

A. I would not be too sure, but what this was typed in Conway and Culligan's office.

Q. Were you present at the time?

A. No. A fellow named Jules Mendich, who was credit manager at that time.

Q. Can you tell us anything about the circumstances which resulted in drawing that assignment?

A. Well, as I remember, the jobs all of a sudden stopped, from lack of funds from Mr. Scardino, and there were labor bills to be paid and material bills to be paid, and Conway and Culligan assumed

(Testimony of Harold E. Casey.)

those obligations so as to keep themselves free of liens, you see. [38]

Q. In all events, this money was paid directly to you, was it not?

A. That is right. They paid, as I remember, the labor bills, also, that were incurred at that time.

Q. This money was due and owing from this firm to Mr. Scardino?

A. That is right. In other words, we either got our money or had lien rights on these particular jobs.

Q. You did not file liens?

A. We did not file liens; we got our check.

Q. What are these documents you handed me, Mr. Casey?

A. Those are a couple of jobs Mr. Scardino was doing for Mr. Schmidt, and at that time he gave us a series of these authorizations on the American Trust Company. We received them all except these two, which are still under suit with Mr. Schmidt.

Q. Who gave them to you, Mr. Scardino?

A. No, Mr. Schmidt. His signature is on them.

Q. In other words, they represent money, also?

A. They represented money due or against a lien on each particular job. On these last two jobs, if I remember right, they did not draw the money from the bank because they sold the house and got the money and then paid off.

Q. Were those moneys due and payable to Mr. Scardino, do you know?

(Testimony of Harold E. Casey.)

A. No, due and payable to H. E. Casey and Scardino.

Q. Before the assignment was made to Casey, did they represent moneys due Scardino?

A. That is right, and due to us.

Q. May I see those, please? Were these moneys received by H. E. Casey & Company?

A. Not those particular two amounts. [39]

Q. These two were not?

A. That is right. They are still outstanding.

Q. Do you know where Schmidt may be reached? Do your records indicate?

A. Well, that is R. Schmidt, isn't it? 1949-15th Street, San Francisco.

Q. These outstanding items represent what? \$81.43, dated January 15, 1942, and the other for \$81.43, dated the same date. Did you make an attempt to collect these items, Mr. Casey?

A. Yes, we have.

Q. What information, if any, did you receive?

A. Well, it is under suit now.

Q. Suit is pending? A. Yes.

Q. Where, here in San Francisco?

A. I tell you, it is really not a suit. Schmidt and his attorney, I cannot recall his name, put up a bond for \$500 to clear us from the forfeit of any lien by us, so that money is on deposit between our attorney and his, to the settlement of the claim.

Q. You mean the bond to secure the claimants for these two? A. And other accounts.

Q. In which Mr. Scardino was interested?

(Testimony of Harold E. Casey.)

A. That is right.

Q. How many of these documents labelled American Trust Company, not negotiable, did you receive from Mr. Scardino?

A. The total is there, isn't it?

Q. Will you find it for me? I cannot see a total on this.

A. Maybe it is not. You had a total of \$162.86, didn't you?

Q. The sum total of these two items here.

A. All right. There is another total of \$252.35 and \$246.50. Those together would make \$661.71. Is that correct? [40]

Q. That is correct.

A. Then the \$252.35 and the \$246.50 are the ones paid, leaving \$162.86 still open.

Q. Can you tell me when you received payment on those two items?

A. Well, it would be in December and January, I imagine.

Q. December, 1941 and January, 1942?

A. Yes, or maybe November and December. I could not tell from here.

Q. I wonder if you could ascertain the dates you received the payments?

A. I will see if I can check it through here. \$252.37 on January 20.

Q. 1942? A. That is right.

Q. And the \$246.50, do you find that item?

A. I don't find that one. It would be here in a series.

(Testimony of Harold E. Casey.)

Q. In all events, it was subsequent to the execution of these documents on January 15, 1942?

A. That is right.

Q. They are all executed on the same date, these blue documents? A. Yes.

Q. What activity, what participation did you have in connection with the execution? Did you accompany Mr. Scardino?

A. No, these are drawn at the American Trust Bank.

Q. At whose instigation?

A. Schmidt and our man, Mendich. I don't know whether Scardino was there or not.

Q. Your man's name is what?

A. Mendich.

Q. Your man?

A. Yes. That would be the American Trust Company at Burlingame.

Q. Yes. Was Mr. Mendich present also when that assignment was executed here at the office in San Francisco?

A. Yes. Not here in San Francisco, Burlingame. [41]

Q. I have reference to this other document we spoke of a moment ago, the carbon copy of the assignment?

A. Oh, yes. That was drawn at their office in Burlingame Village.

Q. They have an office in Burlingame Village?

A. That is right.

(Testimony of Harold E. Casey.)

Q. Conway and Culligan?

A. That is right.

Q. Your man Mendich was there at the time of the execution? A. Yes.

Q. Did you yourself have conferences or conversations with Scardino in December, 1941 or January, 1942? A. Yes, a lot of them.

Q. You yourself did? A. Yes.

Q. At his home? A. No, my office.

Q. Can you tell us the content of those conversations?

A. Well, they might be relevant to jobs or payment on jobs. In other words, there was always money involved in them or telling him where a particular contractor was starting a job, where he could go and get some business for himself.

Q. Was there any conversation you had with him yourself in connection with the assignment which resulted in the payment to your company of that \$2,035.89?

A. I don't think directly with Scardino but with Conway and Culligan.

Q. Did you direct Mr. Mendich to speak with him?

A. I am pretty sure at the time this was done, Mendich and Scardino were present.

Q. Did Mr. Mendich have these discussions with Mr. Scardino under your direction?

A. That is right.

Q. How can we ascertain? Will you get the

(Testimony of Harold E. Casey.)

information and [42] forward it to us in connection with the date of the payment of that \$2,035.89?

A. I will find out and drop you a letter or phone you.

Mr. Margolis: I will appreciate that.

A. The date of this payment. That is all you want, this particular item?

Q. The payment received by yourselves.

A. Yes.

Mr. Margolis: Are there any questions, Miss Phillips?

Miss Phillips: I am just new at this, Your Honor. This is the first time I have been at any of these meetings.

The Referee: Take your time.

Miss Phillips: Q. I wanted to ask the witness, you got assignments of various items on different jobs. Mr. Scardino was engaged in those jobs; you got the assignment of money due to him. Is that right?

A. Mr. Scardino is a plaster contractor; we are material dealers selling Mr. Scardino on these particular jobs being completed for Conway and Culligan, in which we had money due for materials furnished.

The Referee: Q. From Mr. Scardino?

A. That is right, or had our lien rights against the property.

Miss Phillips: Q. That was my understanding of what you said. This assignment, dated the 18th

(Testimony of Harold E. Casey.)

day of February, 1942. How long before the 18th day of February, 1942, that is the date of the assignment, had you supplied these building materials to Mr. Scardino?

A. I imagine maybe five or six years. Not in this particular tract. You mean how long have I been selling to him?

Q. No, I mean on February 18, 1942, how much did Mr. Scardino [43] owe your firm?

A. On February 18th?

Q. Yes. How much was he indebted to your firm at that time, the date of the assignment? How much did he owe you at that time?

A. Well, on January 31st we had \$4,308.73.

Q. Now that total, \$4,308.73, that is an indebtedness created during what period of time? How long outstanding was that indebtedness of \$4,308.73?

A. Well, I imagine, as I say, probably four or five years. In other words, we had been doing business with him and at no time—go back to October, 1941. There are other ledger cards. At no time had Mr. Scardino ever balanced off. In other words, I show on October 25 here a balance of \$4,585.46 in 1941.

Q. How much had he paid you between the 25th of October and the first of February?

A. Well, I would have to have an adding machine to do that. I could not tell you.

The Referee: Q. Have you the records there?

A. Yes, but I would have to add it all up.

(Testimony of Harold E. Casey.)

The Referee: How long would it take? We have an adding machine here.

Miss Phillips: Q. You see, what I am getting at is, you say the first of February he owed you \$4,300 plus?

A. That is right.

Q. That, presumably, was about what he owed you on the 18th of February?

A. That is right.

The Referee: You mean October.

Miss Phillips: No, he said January 31st Mr. Scardino owed \$4,308.

The Witness: A. That is right.

Miss Phillips: Q. I asked over how long a period that [44] had been built up and he said four or five years. In October Mr. Scardino owed \$4,500.

What I am getting at, how much was paid off in that time? How old is this indebtedness?

A. May I say this. During this period we were furnishing other jobs besides the particular jobs the assignments were on. In other words, he had then thousands of dollars beyond that which were being paid and carried on. Do you get my point?

Q. Yes. Am I to understand then that the assignment of money that you got in February, 1942, those assignments may have gone to pay debts created perhaps two or three years before that?

A. No, the assignment is specific in naming the particular jobs, so the money was paid on the particular jobs under construction for Conway and Culligan, no one else, no other jobs.

(Testimony of Harold E. Casey.)

Q. Now, you had supplied materials that had gone into those particular jobs?

A. That is right.

Q. At that time?

A. That is right. And that is money due us on particular jobs and was the amount of the assignment at that time, and he had been doing jobs prior to that maybe five or six months, which we previously had received money for. Are you clear now?

Q. How long had the work been going on on the job numbers you have given us?

A. If I remember right, I think they started that subdivision in there and were operating maybe four months prior to that, March 5.

Q. Each one of these job numbers represents a different house?

A. Each represents a house.

Q. A structure of some kind in which building materials have [45] gone into?

A. That is right. So the particular assignment had nothing to do with any other amounts we might carry on our ledger. That was a specific payment.

Q. Was the firm of Conway and Culligan, were they the main contractors doing the buildings?

A. They were the contractors; Mr. Scardino was doing the plastering work for them.

Q. He was in the nature of a subcontractor for them? A. That is right.

Miss Phillips: Q. I think that is all, your Honor.

(Testimony of Harold E. Casey.)

The Referee: Any other questions, Mr. Margolis?

Mr. Margolis: Q. Any payments that were made from time to time, whether under those assignments or other moneys you had theretofore received from Mr. Scardino, were credited to him?

A. That is right.

Q. In other words, this was an open account?

A. That is right.

Q. Will you ascertain and let us know when you received the \$2,035 as well as the \$246.50?

A. That was on the Schmidt.

Q. That is right. You gave us January 20, 1942, for the \$252.35? A. Yes.

Mr. Margolis: No further questions.

Mr. Pardini: Q. You ascertain the amount of \$252.35 having been received January 20, 1942 from the general account or ledger account on Scardino?

A. Having that in one.

Q. Because that happened to be a single, separate payment? A. That is right.

Q. The other payments all being included in some other [46] payment or just lumped with some other sums perhaps? A. Yes.

Q. But they will be contained on the ledger statements you do have, and that, by the way, is a general account of Scardino owing to you people and showing any amounts received by you that were to be credited to the general account of Scardino? A. That is right.

(Testimony of Harold E. Casey.)

Q. That will also contain, among other collections, the sum of \$2,035 which you got from Conway and Culligan? A. That is right.

Q. And that will be contained on this sheet you are holding?

A. That is right. That \$235 you asked for, probably was not made in one payment.

Q. \$252.35 appeared to be made in one payment?

A. I may be wrong even in that. \$252.37 and \$252.36 is so close.

Q. In other words, there might have been a small adjustment of a few cents. But, in other words, this ledger card you now have, being two sheets of the ledger account of J. L. Scardino, address 445 Standish, Redwood City, California, starts with a balance of \$3,905.10 owing by Scardino to you people on October 15, 1941?

A. Right.

Q. And continues right down to October 23, 1942, when there still was a balance owing of \$1,031.52?

A. That is what Mr. Scardino owes us at the present time.

Q. In between there are represented the charges against Mr. Scardino for his materials that he bought from your concern and the credits to Mr. Scardino's account from whatever source received?

A. That is right.

Mr. Pardini: I am representing Mr. Scardino in this [47] matter.

(Testimony of Harold E. Casey.)

The Referee: Yes, I know, Mr. Pardini.

Mr. Margolis: Q. Where did the suggestion come from for the execution of that assignment, do you know, Mr. Casey? A. Which one?

Q. The one that has the lot numbers on?

A. Conway and Culligan's?

Q. That is correct.

A. Well, at the time Mr. Scardino was having his trouble, not paying labor bills and material bills, we went to Conway and Culligan and demanded the money or we would have to proceed with our lien rights.

Q. Those troubles you spoke of occurred about the time it was executed?

A. That is right, prior to that.

Q. January?

A. February, I think, is the date.

Q. Along in January when those non-negotiable documents were executed on the form of the American Trust Company?

A. That is right.

Mr. Margolis: That is all.

The Witness: Now, do you want those ledger cards?

Mr. Pardini: I think we should have a photo-static copy.

The Witness: May I say, I have a duplicate, so may I leave that and keep the original?

Mr. Pardini: Yes, I would appreciate it.

The Witness: I had it made up. I thought you might want it.

(Testimony of Harold E. Casey.)

Mr. Pardini: May we then offer this in evidence as the trustee's exhibit in lieu of the information contained in the original file?

The Referee: Marked Trustee's Exhibit No. 1 on the 21 (a) examination. [48]

TRUSTEE'S EXHIBIT No. 1

Established
20 years

Andrew J. Conway
Thomas J. Culligan, Jr.

Conway & Culligan

Real Estate - Loans - Insurance - Homes
Built and Financed

Burlingame Village,
Burlingame, Calif.

Telephone DOuglas 4941

Monadnock Building

San Francisco

February 20th, 1942

Conway & Culligan
681 Market Street
San Francisco, Calif.

Gentlemen:

You are hereby authorized to pay from any amounts due me for work on your jobs the monies or any part thereof due the following business firms:

San Mateo Feed & Fuel Co.

Frank Perry

H. E. Casey Co.

and all labor bills, and charge same to my account.

In consideration of your paying whatever monies

(Testimony of Harold E. Casey.)

is due me on the above accounts, I shall expect you to hold me harmless provided the statement I have rendered you is correct.

J. L. SCARDINO

Accepted:

T. J. CULLIGAN, JR.

Witness:

J. G. MINDNICE

Mr. Pardini: May I ask one more question?

Q. Mr. Scardino was having difficulty, as was well known, not only on the Conway and Culligan accounts, but on his general business at that time?

A. That is right.

Q. When those things happen in the trade, everyone knows about it? A. That is right.

Q. Mr. Mendich is your credit manager? That is his particular phase, to investigate the business and credit standing of all contractors?

A. That is right.

Q. And to safeguard and protect your concern if possible? A. That is right.

Mr. Pardini: That is all.

(Witness excused)

JOSEPH L. SCARDINO

Called for the Trustee; sworn.

Mr. Margolis: May I borrow the carbon copy of that assignment dated February 18th to refresh Mr. Scardino's memory?

Q. Mr. Scardino, I show you a carbon copy of a document dated February 18, 1942, and ask you whether you ever saw that or the original of it?

A. They make one like this that they make me sign. My signature is signed by me.

Q. Where was that done?

A. In the office of Conway and Culligan in Burlingame Village.

Q. Who was present at that time?

A. Mr. Mendich was there, and Mr. Conway, and Culligan, too.

Q. Mr. Mendich was credit manager for Casey & Company?

A. That is right. So they discussed the thing and Conway and Culligan draw this thing right in Burlingame Village.

Q. Under whose direction, Mr. Mendich's? [49]

A. Well, Mr. Mendich's probably, with Mr. Casey, to protect themselves to have this assignment.

Q. You say you signed the original of it?

A. Yes.

Q. Who did you give it to, Mr. Mendich?

A. I gave one to Mr. Mendich and one to Conway and Culligan. There was three forms that Mr. Casey he got assignments from five or six more different contractors; one from Schmidt, one from

(Testimony of Joseph L. Scardino.)

Donald Johnson, one from Gus Johnson, and Stanley Younger.

Q. Younger?

A. Yes, I cannot spell his name. He came in with a bunch of assignments and I signed each one separate for each contractor.

Q. Were all these assignments made at the same time? A. I signed at the same time.

Q. The same day? A. The same day.

Q. The same place?

A. The same place. Finally it was in my house.

Q. Just a moment. You say you also executed an assignment in favor of H. E. Casey & Company for moneys coming from Mr. Schmidt?

A. Yes.

Q. From Donald Johnson? A. Yes.

Q. Gus Johnson? A. Yes.

Q. And Stanley Younger? A. Yes.

Q. Were they similar in form as the one you examined?

A. I think it was a little different. If I remember right, it was kind of a half-paper. Maybe I am wrong, but it was not the same form of this. Saying, the right to Mr. Casey to collect the money from each individual contractor:

Q. Who drew up the paper you signed?

A. Mr. Mendich, I suppose. [50]

Q. Where were they presented to you, in the office of Casey & Company, or where?

A. No, in front of my house.

Q. They came to your house?

(Testimony of Joseph L. Scardino.)

A. They came to my house.

Q. Who was there besides you and Mr. Mendich?

A. Nobody else.

Q. Then where were they signed, inside your home?

A. We were on the street. We go in the front-room and stayed inside a few minutes and signed right there.

Q. Have you copies of those?

A. Those copies were destroyed.

Q. You lost them, did you?

A. I lost them.

Q. Who retained the originals?

A. Mr. Casey, I suppose.

Q. Wait a minute. You say Mr. Mendich was there and yourself. Is that all? A. Yes.

Q. You signed the originals and turned them over to Mr. Mendich? A. Yes.

Q. Can you tell approximately what month that took place?

A. Well, I would say around February.

Q. February of 1942?

A. Yes, somewhere around there.

Q. Was this Sunday or a holiday that Mr. Mendich called at your home?

A. No, I think it was a working day.

Q. In the morning or at night?

A. At night, around 6:30 in the evening.

Q. Can you tell the contents of any of those documents, to whom they were addressed, or what the documents contained?

(Testimony of Joseph L. Scardino.)

A. No, I cannot; I don't know.

Mr. Margolis: Do you know of any such assignments, Mr. Casey, that Mr. Scardino now mentions?

Mr. Casey: I am trying to find them. I don't see any. I have some correspondence with Schmidt asking for money in [51] one place and another, where we received \$200.16.

Mr. Margolis: From whom?

Mr. Casey: Well, that was February 17, jobs 24 and 25.

Mr. Margolis: Whom did you receive that money from?

Mr. Casey: A. R. Schmidt.

Mr. Margolis: Was that pursuant to an assignment?

Mr. Casey: Well, I say I don't know about the assignment.

Mr. Margolis: Is Mr. Mendich still in your employ, Mr. Casey?

Mr. Casey: No, he is not.

Mr. Margolis: Do you know where he may be located?

Mr. Casey: The Western Pipe.

Mr. Margolis: Western Pipe & Steel? Do you have his home address at your office?

Mr. Casey: His address is in the phone book. It would be under Lang Realty Company, Burlingame.

Mr. Margolis: You say the Lang Realty would know his address?

Mr. Casey: No, that is his address. The San Mateo telephone book under Lang Realty Company,

(Testimony of Joseph L. Scardino.)

on Ralston Avenue. That would be his address.

Mr. Margolis: Now, a search of your file does not reveal any assignments mentioned a few minutes ago by Mr. Scardino with respect to Stanley Younger?

Mr. Casey: I might say, there was an assignment; it is not here, but we received it, I just happened to remember while you were speaking about it, for \$158.39 in October, which was credited to his account.

Mr. Margolis: October of what year, this year?
[52]

Mr. Casey: No, 1942.

Mr. Margolis: What was the amount?

Mr. Casey: \$158.39.

Mr. Margolis: That was under an assignment, also?

Mr. Casey: It was not under an assignment; it was a lien.

Mr. Margolis: You filed a mechanic's lien on the job?

Mr. Casey: Yes.

Mr. Margolis: You got your money in payment of the lien?

Mr. Casey: Yes.

Mr. Margolis: A mechanic's lien, regularly recorded?

Mr. Casey: That is right.

Mr. Margolis: Then you executed a release on receiving payment?

Mr. Casey: That is right.

(Testimony of Joseph L. Scardino.)

Mr. Margolis: That was received from whom, Schmidt?

Mr. Casey: No, that was from Stanley W. Younger.

Mr. Margolis: Did you say October, 1942 or 1941 you got that \$158.39?

Mr. Casey: 1942.

Mr. Margolis: Have you got a copy of the lien that you filed, or a copy of the recorded notice of the filing of the lien?

Mr. Casey: I would have that in the office. How that came to be so late, if you are interested in the information——

Mr. Margolis: Yes.

Mr. Casey: Younger was in trouble, too, and there was a stoppage of work there and in two or three days we learned what was going on, filed our lien, so we collected our money. [53]

Mr. Margolis: You filed no lien on the Schmidt transaction nor the other transactions covering the \$2,035.89?

Mr. Casey: No.

Mr. Margolis: No lien at all?

Mr. Casey: No.

Mr. Margolis: This \$215.16 on February 16th just mentioned, was that 1942?

Mr. Casey: That was on Schimdt's, wasn't it?

Mr. Margolis: I believe you mentioned that the first one.

Mr. Casey: That was February 17, 1942, we acknowledged receipt of \$216.

(Testimony of Joseph L. Scardino.)

Mr. Margolis: And was that pursuant to a materialmen's lien that you filed?

Mr. Casey: No, no, because it reads, "We hereby relieve you of any material furnished this particular job."

Mr. Margolis: Schmidt sent it to you directly?

Mr. Casey: What happened on those particular checks, he would make the check in the name of Scardino, endorse it, and we would take it.

Mr. Margolis: What I am interested in, Mr. Casey, is this: I notice the assignment is dated February 18, 1942. Now, you mention an additional item which you say you received February 17th. Was there an assignment in connection with that February 17th, or did you receive that in the regular course?

Mr. Casey: In the regular course.

Mr. Margolis: Directly from Mr. Schmidt?

Mr. Casey: That is right.

Mr. Margolis: Q. Have you any papers or documents in [54] connection with these matters there, Mr. Scardino, or did you lose them all?

The Witness: A. I lost all. I have all in one box. One day, as I told you, I left it with some friend of mine and his dog got hold of them.

Q. And chewed them up?

A. And chewed them up.

Mr. Pardini: Some considerable papers were turned over.

Mr. Margolis: I have in mind these particular ones.

(Testimony of Joseph L. Scardino.)

Mr. Pardini: I know, but all the remainder available. Some are usable and some are not. They were turned over and what few are left are always available, of course.

Mr. Margolis: Now, I think we can get the testimony in regard to conversations with the San Mateo Feed & Fuel, or shall we let it go? That is all at this time, Your Honor. Do you wish to ask a question?

Miss Phillips: No.

Mr. Pardini: He will be available and will come back some other time; will you not, Mr. Scardino?

The Witness: A. Any time that is convenient.

The Referee: We will let you go, with the understanding that we will notify you.

Mr. Pardini: Notify me.

The Witness: Notify me any time.

(Concluded)

[Endorsed]: Filed with Referee May 21, 1943.

[Endorsed]: Filed with Clerk Sep. 30, 1943.

[55]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 4th day of October, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable A. F. St. Sure, District
Judge.

[Title of Cause.]

No. 34909.

**ORDER OF RE-REFERENCE ON PETITION
FOR REVIEW**

This matter came on regularly this day for hearing on the Referee's Certificate on Petition for Review, whereupon the Court ordered that the Record of Proceedings herein be returned to the Referee for further proceedings, in accordance with his request and Title 11 U.S.C.A., Sec. 11 (10).

[56]

[Title of District Court and Cause.]

**CERTIFICATE AND REPORT OF REFEREE
ON PETITION FOR REVIEW FILED ON
BEHALF OF SAN MATEO FEED AND
FUEL CO. ON FEBRUARY 26, 1944**

To Honorable A. F. St. Sure, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, and the referee in charge of this proceeding, hereby respectfully certify and report that: [57]

On April 2nd, 1943, the following verified petition was filed herein:

"The petition of G. S. Hayward, respectfully represents:

“That on April 29, 1942, the above named bankrupt filed his voluntary petition in bankruptcy herein, and on April 30, 1942, was duly and regularly adjudicated a bankrupt; that on May 21, 1942, petitioner was duly appointed Trustee of the estate and effects of the above named bankrupt, and thereafter duly qualified and presented the Bond, required of her as such Trustee, which was approved by the Court; that ever since said May 21, 1942, petitioner has been and now is the duly qualified and acting Trustee in these proceedings.

“That on said April 29, 1942, the day of the filing of bankrupt’s petition in bankruptcy herein, said bankrupt had assets consisting of moneys assigned to H. E. Casey Company, 835 Woodside Way, San Mateo, California, in the sum of \$2696.92, and moneys assigned to San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, in the sum of \$1279.47; that said assignments were made by said bankrupt to the respondents hereinabove named within four (4) months of the filing of his petition in bankruptcy herein, without any consideration therefor, and petitioner alleges that upon the filing of bankrupt’s said voluntary petition, said sums of \$2696.92 and \$1279.47, passed to the petitioner, as such Trustee herein, to be administered with the assets of this estate.

“That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was insolvent and caused said bankrupt to make said assignments without any consideration therefor. That said moneys so received [58] by said

respondents are held by them without color of right or title thereto and petitioner alleges that she is entitled to the immediate possession of the same.

“Wherefore, petitioner prays for an order requiring the said H. E. Casey Company and the said San Mateo Feed & Fuel Company to appear before the Honorable Burton J. Wyman, Referee In Bankruptcy, at his Courtroom, #609 Grant Building, 7th & Market Streets, San Francisco, California, on a day and at a time certain to then and there show cause, if any they or each of them have, why they and each of them should not be ordered to turn over to petitioner, as such Trustee the respective sums of \$2696.92 and \$1279.47 held by them to be administered in these proceedings, and for such other and further relief as may be just and proper in the premises, for which no previous application has been made.

“G. S. HAYWARD

“Petitioner

“MAX H. MARGOLIS

“Attorney for Petitioner”

[Verification omitted for sake of brevity.]

(See original of said petition on file in the office of the Clerk of this Court.)

Subsequently, but on said last mentioned date, the following order to show cause, based on said petition, was filed herein:

“Upon the reading, consideration and filing of

the annexed verified petition of G. S. Hayward, Trustee of the estate of the above named bankrupt and upon all the proceedings heretofore had herein, and good cause appearing therefor,

“It Is Hereby Ordered, that H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo [59] Feed & Fuel Company, 850 San Mateo Drive, San Mateo, California, appear and show cause, if any they or each of them have, before the undersigned Referee in Bankruptcy at his Courtroom located at #609 Grant Building, 7th & Market Streets, San Francisco, California, on April 12th, 1943, at the hour of 2:00 P.M. of said day or as soon thereafter as counsel may be heard, why they and each of them should not be ordered to turn over to the Trustee herein, the sums of \$2696.92, and \$1279.47 held by them respectively as more particularly described and referred to in said Trustee’s verified petition;

“It Is Further Ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee’s verified petition, including all of the information regarding the Notices of Completion in connection with the receipt of said moneys under and by virtue of said assignments;

“It Is Further Ordered, that service of this order and annexed petition be made upon said respondents, H. E. Casey Company, 835 Woodside Way, San Mateo, California, and San Mateo Feed & Fuel Company, 850 San Mateo Drive, San Mateo,

California, by mailing copies thereof to said Respondents and to F. E. Hoffman, Esq., attorney for said latter respondent, 220 - 3rd Avenue, San Mateo, California, on or before April 2nd, 1943, be deemed good and sufficient service and the time for said service is hereby shortened accordingly.

“Dated: San Francisco, California, in said District; April 2nd, 1943.

“BURTON J. WYMAN

“Referee in Bankruptcy”

[60]

(See original of said order to show cause on file in the office of the Clerk of this Court.)

Thereafter, and on April 10, 1943, the following verified answer was filed herein on behalf of San Mateo Feed & Fuel Co.:

“Now comes San Mateo Feed & Fuel Co., a California Corporation, and for answer to Trustee’s Petition For Turnover Order, admits, denies and alleges as follows, to-wit;

“Said Corporation denies that on April 29, 1942, the day of the filing of bankrupt’s petition in bankruptcy herein, said bankrupt had assets consisting of monies assigned to San Mateo Feed & Fuel Co., a Corporation, in the sum of \$1279.47, or in any other sum, or at all; denies that said assignments were made by said bankrupt to said respondent within four months of filing bankrupt’s petition in bankruptcy, without any consideration therefor; denies that said alleged sum of \$1279.47 passed to said petitioner to be administered with the assets of said estate; denies that at the time of the alleged

assignments, respondents knew bankrupt was insolvent and/or caused said bankrupt to make said assignments without any consideration therefor, and in this connection alleges that on February 17, 1942, said bankrupt did make certain assignments to respondent herein of certain monies, which said monies were never paid to respondent pursuant to said assignments; denies that said respondent received the money alleged to have been received in said petition, or any money at all pursuant to any assignments made by said bankrupt to respondent; denies that respondent holds any money received pursuant to any assignment; denies that the monies received by respondent from said bankrupt are held by it without color of right or title thereto; denies [61] that petitioner is entitled to the immediate possession of any monies paid by said bankrupt to respondent.

“Further answering said petition, respondent alleges that said bankrupt did pay certain money to respondent upon an open book account, but not pursuant to any assignment, and in this connection alleges that said payments were made by said bankrupt and received by said respondent on account of goods, wares and merchandise furnished said bankrupt by said respondent, and for a valuable consideration.

“Wherefore, respondent prays that petitioner’s order requiring San Mateo Feed & Fuel Co., a corporation, to turn over to petitioner as trustee, the

sum of \$1279.47 be denied, together with such other and further relief as to the court may seem proper.

“SAN MATEO FEED & FUEL
CO., a corporation,

By GEO. FERRIS

“Vice-president

Respondent

“F. E. HOFFMANN

“Attorney for Respondent.”

[Verification omitted for sake of brevity.]

(See original of said answer on file in the office of the Clerk of this Court.)

Later, and on April 12, 1943, there then being present in court Max H. Margolis, Esq., the attorney for the trustee, F. E. Hoffman, Esq., the attorney for San Mateo Feed & Fuel Co., Hugh F. Mullin, Jr., Esq., the attorney for H. E. Casey Company, the other respondent named in the aforesaid petition and order to show cause, and Julian Pardini, Esq., the attorney for the bankrupt, the following proceedings were had: [62]

“Mr. Mullin: If Your Honor please, I would like to file the answer of H. E. Casey Company to the petition.

“Mr. Pardini: In view of the allegations, I received a copy of the petition of the trustee here, and having entered into the matter late, I am going to prepare a petition to Your Honor to amend the petition and set forth, possibly, the claims of the two people cited here and others in the same class.

“The petition originally filed shows that it evidently was put together in a hurry and there is nothing to show there was at that time a balance due at that time and it should have been put in. Whether or not the debtor thought there was at that time, there was a technical existence of a creditor-debtor relation, which the schedules do not show.

“The Referee: Will it interfere with your hearing today?

“Mr. Margolis: Not at all.

“The Referee: Put on your first witness.

“JOSEPH L. SCARDINO

“Called for the Trustee; sworn.

“Mr. Margolis: I wonder if either of you two gentlemen, or you, Mr. Hoffman, have the original assignment, or will you see if you can find something similar to that in your file?

“Mr. Hoffman: I never have seen anything like this. I think Mr. Mullin has the assignment, but this pertains to the H. E. Casey Company.

“Mr. Margolis: Yes. I thought perhaps there was something similar to that document that I hold in my hand with reference to certain assignments made respecting your client.

“Mr. Hoffmann: We might expedite this thing some. The only assignments the San Mateo Feed & Fuel Company have in their file are dated, all of them, February 17, 1942, [63] which I have here, and total \$1,673. There have been no payments received on account of any of those assign-

(Testimony of Joseph L. Scardino.)

ments. However, since preparing my return, Judge Mullin called my attention to an assignment here from Conway and Culligan which mentions the San Mateo Feed & Fuel Company, but in no specific amount.

“Now, Scardino, in the San Mateo Feed & Fuel, had an open account. I brought the ledger sheets dating from February 20—no, December 1st, 1941, and continuing through to October 27, 1942. That was the last entry and that was a cash receipt. This is just part of the ledger sheets. It runs over a period of five years, roughly. The payments shown on here, all credited, and there is only one payment received after February 20. There is only one payment received after the date of the assignment Mr. Mullin has. This I never have seen before.

“I might explain that this way, if Your Honor please: The credit manager formerly in charge of the credits of the San Mateo Feed & Fuel Company no longer is with them. I don't know exactly where he is at the present time, and these records I have here are for the most part—well, they are just the regular ledger. Pursuant to the order, we have searched the files and I have here the only assignments, apparently, that are in the files of the corporation. None of them pertain to any of the payments that were made here. Now, as I say, Mr. Mullin dug up an assignment from Conway and Culligan which does not refer to a specific amount, but recognizes an indebtedness outstanding, and apparently no moneys were paid to the San Mateo Feed & Fuel Company under that assignment.

(Testimony of Joseph L. Scardino.)

“Mr. Margolis: Perhaps we can speed this up. At the last hearing neither counsel were present and this may take [64] a little time to refresh their memories. Mr. Mullin, at the last hearing, Mr. Casey produced their file. That is correct, is it?”

“Mr. Mullin: An unexecuted assignment.

“Mr. Margolis: I now wish to follow it. You may have a copy of it.

“Mr. Mullin: That is an unexecuted copy.

“Mr. Margolis: Yes. I will inquire about the original.

“Mr. Margolis: Q. Did you ever see this document, Mr. Scardino? You will recall we questioned you about that document at the last hearing some weeks ago.

“The Witness: A. I don't recall this. I don't recall seeing this. I saw some similar that he sent to the house. That is the balance due on the San Mateo Feed & Fuel.

“Q. Did you see the original of that? That purports to be a carbon copy.

“Mr. Hoffman: Q. That is the balance due on the H. E. Casey Company, isn't it?

“A. I did see one, but I could not say.

“Mr. Margolis: Q. Did you sign a document similar to that at any time?

“A. I signed a bunch of them similar to that, which was smaller than this, which the bookkeeper from Casey Company came down to the house and he wants me to sign all these papers, I recall it, to individual general contractors.

(Testimony of Joseph L. Scardino.)

“Q. Did you have the original of that document at any time? A. No, I did not.

“Q. Did you ever sign the original?

“A. I keep one and signed. He kept the other.

“Q. Did you sign one?

“A. Yes, I did sign all.

“Q. Now, whom did you give them to? [65]

“A. To the bookkeeper, whoever was in charge of the collections.

“Q. Do you know the name of the bookkeeper?

“A. I don't recall. I think you got it in the book there.

“Q. Do you know who Jules Mendich is?

“A. Jules Mendich.

“Q. Is that the man you spoke to?

“Mr. Mullin: We will stipulate that he was the bookkeeper at that time for H. E. Casey Company.

“The Witness: A. I don't know his name.

“Mr. Margolis: Q. Did you hand him the original of this document? A. Yes.

“Q. Do you know what happened to it?

“A. I don't know what happened to it. I told you mine was destroyed by an accident.

“Q. No, about the original, Mr. Scardino?

“A. I don't know.

“Q. That was executed, was it, on the date written on the top of it, February 18th?

“A. February? I cannot see very good.

“The Referee: February 29th?

“Mr. Mullin: February 18th on this.

(Testimony of Joseph L. Scardino.)

“Mr. Margolis: February 18, 1942.

“The Referee: Oh, yes, February 18, 1942.

“Mr. Margolis: Q. The original of this was signed on or about that date? A. Yes.

“Q. Did you have any conversations with this gentleman prior to this date?

“A. On that day, no.

“Q. Prior to that date, did you have conversations with him in connection with the money you owed H. E. Casey & Company?

“A. He used to come and complain the account was too big, I will have to pay this bill. I told him I am broke, [66] I have no money. If I cannot collect, I cannot pay.

“Q. You say he used to come, where, to your home?

“A. Sometimes he came to my home and could not find me and he looked around on the jobs until he met me, which was mostly 39th Avenue, or Conway and Culligan's, any place he could get hold of me.

“Q. What was the extent of the conversation? What did you say to him?

“A. He say: ‘We have to get some money; we cannot go on like this.’ I say: ‘I cannot help it. I got no money; I am broke.’

“Q. And how long prior to February 18, 1942, did this conversation take place? Was it a month before?

“A. I would say more than that, and he was talking right along. In fact, there was another

(Testimony of Joseph L. Scardino.)

bookkeeper before that. I was in bad condition on the payments and he used to go to the general contractor and tell him, 'Don't make any more checks. Whenever you make the check, to make it jointly.'

"Q. Do you know whether such checks were made to H. E. Casey Company and yourself jointly?

"A. Yes, they wanted those checks like that and we had to make them like that, seeing this was referring to the general contractor.

"Mr. Margolis: Do you know where the original of this is?

"Mr. Mullin: I don't think the original was ever signed, so far as I know.

"Mr. Margolis: Q. Where are your books and records, Mr. Scardino?

"A. My books and records I move from Menlo Park and part I left and another part I put some place in Redwood City. I put it in a separate room like a garage, but there was a key on when I put it, but the owner forgot and left it open. He had a dog that went in there in that [67] room and destroyed everything, chewed everything up, and that is what happened to all my records.

"Q. Did you get any of the moneys set out alongside the jobs in that letter?

"A. I did not get any more money since I quit the business. I did not collect a cent.

"Q. You did not collect a cent?

"A. No, sir.

"Q. I show you this letter, on the stationery of Conway and Culligan, and ask you if that is your signature?

(Testimony of Joseph L. Scardino.)

“A. That is mine, yes.

“Q. Do you know whose this is?

“A. That is Tom Conway.

“Q. Do you know whose this was?

“A. That is Mr. Casey’s bookkeeper.

“Q. Mr. Mendich? A. Yes.

“Mr. Margolis: I will offer it in evidence.

“The Referee: Trustee’s Exhibit No. 1.

“Mr. Margolis: Q. Did you ever speak with Mr. Ferris of the San Mateo Feed & Fuel Company?

“A. Yes.

“Q. Within thirty, sixty or ninety days prior to the filing of this petition in bankruptcy here, in connection with the account?

A. I spoke to Mr. Ferris, Jack Ferris, which he was the salesman and collector at the same time.

“Mr. Mullin: That is not Mr. Ferris.

“Mr. Margolis: Q. Of the San Mateo Feed & Fuel Company. You know Mr. Ferris?

“A. I know him personally. I did not talk to him. He had a bookkeeper took charge of all the collecting.

“Q. Do you know the bookkeeper’s name?

“A. He changed it a couple of times there, two or three times he changed. I don’t recall.

“Q. Who was the bookkeeper you saw?

“A. He had one manager years ago and changed to another. I could not recall his name. [68]

“Q. Now, can you tell us where you signed this

(Testimony of Joseph L. Scardino.)

letter I just showed you, Trustee's Exhibit No. 1?
Where was it?

"A. Conway and Culligan's office in Burlingame Village.

"Q. Who was there at the time you signed it?

"A. At the time I was there, Tom Culligan, and I think Mr. Conway was there, that other party; I was there, Mr. Mendich was there. If I recall, I think Mr. Casey was there, but I don't know if he stayed there until the end or left. I don't recall.

"Q. Was anybody else there?

"A. There was the bookkeeper.

"Q. Anyone from the San Mateo Feed & Fuel Company there? A. No.

"Q. Did you have any member of the firm of the San Mateo Feed & Fuel Company, or the bookkeeper, call on you about this time in connection with the obligation due the San Mateo Feed & Fuel?

"A. The bookkeeper comes and brings those assignments and makes me sign to give him full authority to collect the money that is coming. I think that is what I signed; that is these I signed, every one of those are individual.

"Q. Each and every one has your signature?

"A. Yes.

"Q. Dated February 17, 1942?

"A. That is right. Those are my signatures, yes, sir.

"Q. Now, can you tell the Court where these

(Testimony of Joseph L. Scardino.)

were signed, were you in a house, an office, where, if you recall?

“A. I think, I cannot recall, we were down on 39th Avenue on this job, right on the street, or either in his car.

“Q. Whose car?

“A. The fellow who was collecting.

“Mr. Hoffman: What is his name?

“Mr. Mullin: Jack De Monte.

“Mr. Margolis: Q. Does that refresh your memory? Do [69] you remember Jack DeMonte?

“A. I say I know the man when I see him. I told you I don't know the name unless you tell me now.

“Q. Does that name refresh your memory?

“A. That is right.

“Q. You had seen him before that time?

“A. Every other day he used to come around on the jobs.

“Q. What conversation did you have with him?

“A. He came down, he was in charge to collect money for the San Mateo Feed & Fuel, and said unless I pay some money he will lose his job. I say: ‘I haven't got no money. When I collect, I will give it to you.’

“Q. Did you discuss your financial condition with him generally?

“A. I did. I told him I am broke, I got no money in the bank or anyplace else.

“Mr. Margolis: You may cross-examine. Just a minute.

(Testimony of Joseph L. Scardino.)

“Q. Did you receive any moneys from those assignments? A. No, sir.

“Mr. Margolis: I offer these in evidence, if the Court please, and ask that they be appropriately marked as the next in order.

“The Referee: Trustee’s Exhibit No. 2.

“Cross Examination

“Mr. Mullin: Q. Mr. Scardino, do you ever remember signing the original of this assignment, dated February 18, 1943?

“A. This one here?

“Q. Do you know whether or not you ever signed it?

“A. This here, I told you before, that this here I don’t recall exactly if I did sign or not.

“Q. You are not sure? A. No.

“Q. But you recall signing these?

“A. That I signed, this and another one.

“Q. You had been doing business with H. E. Casey Company a number of years, had you not?

“A. Since 1927, I think. [70]

“Q. Or earlier?

“A. Now, I don’t recall the month it was, either June or July.

“Q. Well, it was quite common, was it not, for the credit managers, both of the San Mateo Feed & Fuel Company and H. E. Casey Company, to come and call on you for payments over a period of years?

“A. Not as early as I started business. After about a year or so, they used to come often.

(Testimony of Joseph L. Scardino.)

“Q. From 1938 on?

“A. Just about '38, and as a matter of fact, as I say before, I complained at that time that they should not do that. They went to the general contractor and tell them don't make the check on my name alone, make a joint check whenever payments are coming, either the first or second account.

“Q. It was quite common for you in your business, from 1938 on at least, to have checks from the general contractor to you as subcontractor, to be made payable jointly to you and the material house who supplied you sand, plaster, or the materials used?

“A. I did not sign anything. They got it without my authority. They tell the general contractor whenever they make a check to Scardino, don't make it to his name alone.

“Q. You knew that at the time?

“A. I knew it was done. I went to Mr. Casey and complained about it. I went to the bookkeeper and all. Mr. Casey knew that, too. I went in the office.

“Q. You continued buying merchandise?

“A. Yes.

“Q. And it was also quite common with you to get assignments, authorized assignments, from the general contractor to make payments to your material men, was it not?

“Mr. Margolis: Objected to on the ground that it is argumentative. It is not material whether or not he gave assignments heretofore.

(Testimony of Joseph L. Scardino.)

“Mr. Mullin: If the Court please, I propose to show [71] an established custom and practice with this bankrupt in his business over a period of years.

“The Referee: Why would that make a difference, if it was done within four months and violated the Bankruptcy Act?

“Mr. Mullin: Your Honor, my understanding of the Bankruptcy Act may not be correct, but my understanding is, that any assignment that has been taken in good faith for adequate consideration is a good assignment, although made within four months.

“The Referee: Well, you can show that each one you have here was for adequate consideration, but the fact that it went on over a number of years would not mean that one might be absolutely valid and the next one not.

“Mr. Mullin: Unfortunately, Your Honor, in presenting proof you cannot offer it all at once. But I ask to establish a custom with this man.

“The Referee: In face of the objection, that is not good.

“Mr. Mullin: For the purpose of the record in the matter, I would like the record to show that H. E. Casey Company makes an offer to prove, to show that the practice of assignments had been common with the bankrupt and with others during all the period of years prior to the filing of this bankruptcy.

“The Referee: That may go in the record.

(Testimony of Joseph L. Scardino.)

“Mr. Mullin: Q. Do you recall where this assignment of February 20th was signed?

“The Witness: A. I cannot remember the date, but I know I signed it.

“Q. Do you know where you signed it?

“A. In Conway and Culligan’s office in Burlingame Village.

“Q. Do you recall whether or not Mr. Casey was present?

“A. As I told you, I recall he was present, but I cannot remember whether he was there at the last. I know the bookkeeper was there, but I could not say whether he was there at the end or not. [72]

“Q. You were indebted to H. E. Casey Company at the time you signed that? You owed them money?

“A. Not to Conway and Culligan, to Mr. Casey.

“Q. I say, at the time you signed the assignment, you owed H. E. Casey Company some funds, you owed them money, did you?

“A. On material that went on Conway and Culligan’s and other jobs.

“Q. You still owe them a balance, do you?

“A. I don’t know if I owe a balance or not, because I gave full authority to collect these moneys I have coming.

“Q. In your schedules in bankruptcy did you list H. E. Casey Company as a creditor?

“A. I don’t think so.

“Q. And they are not included?

“A. The reason why, I think they had full

(Testimony of Joseph L. Scardino.)

authority to collect the money. If I did not have plenty, they could get a lien on those jobs, each individual, for the material. Suppose I collect the money and run away? They are not going to lose the material. They are going to lien those jobs and get it.

“Q. In fact, at the time you signed the assignment, their lien period time was running short, wasn't it? A. No, sir.

“Q. On some jobs?

“A. On some jobs, probably, yes, ten days. On other jobs they had sixty or ninety days.

“Q. But some were within a ten-day period?

“A. Maybe one or two jobs, maybe not.

“Q. You stopped operating as a plaster contractor shortly afterward, did you not?

“A. I stopped before that, maybe a week before.

“Q. In fact, you did not finish these jobs yourself; someone else had to finish them?

“A. No.

“Mr. Mullin: That is all.

“Mr. Hoffman: Q. The assignment here, Mr. Scardino, dated February 20th, addressed to Conway and Culligan, as [73] I understand, was signed at the office of Conway and Culligan in the presence of Mr. Casey's credit manager, possibly Mr. Casey, and Conway and Culligan. No one from the San Mateo Feed & Fuel Company was there, were they?

“A. Not that day.

(Testimony of Joseph L. Scardino.)

“Q. You have shown no balance due to the San Mateo Feed & Fuel Company. Didn't you know how much was due H. E. Casey Company and the San Mateo Feed & Fuel Company? Didn't you know how much you owed them? A. Yes.

“Q. On these three last cases?

“A. The San Mateo Feed & Fuel and Casey.

“Q. They were not listed?

“A. No, because I told you there was enough money. Even if there was not, they could get the money

“Q. You received statements from time to time from them? A. Yes.

“Q. These assignments here, all dated February 17th, do you know whether or not the San Mateo Feed & Fuel Company ever received payment on account of those assignments?

“A. I don't know.

“Q. You don't? A. I don't know.

“Mr. Hoffman: No further questions.

“Mr. Mullin: Just one further question.

“Q. Mr. Scardino, you also received statements from H. E. Casey Company, did you not?

“A. Yes.

“Q. Monthly bills?

“A. Yes, but they was all destroyed and I have not got any.

“Redirect Examination

“Mr. Margolis: Q. In answer to a question of Mr. Mullin, he asked you about the jobs all being uncompleted when you quit your business?

(Testimony of Joseph L. Scardino.)

“A. No, maybe there was three or four jobs not completed. The rest of them were all completed. [74]

“Q. The rest of them were all completed?

“A. Absolutely. There just was maybe \$100 or \$150 labor and very little material to go on perhaps, and I had about forty jobs going on all told. That was all I left, four jobs without completing.

“Q. Now, you also testified that the date that assignment was signed, that letter on Conway and Culligan’s stationery, that no one from the San Mateo Feed & Fuel Company was there that day?

“A. No.

“Q. Did you mean to say that you saw and spoke to them in connection with that at any other time?

“A. The San Mateo Feed & Fuel?

“Q. Yes.

“A. Yes, the bookkeeper, I think, came down before I signed this.

“Mr. Pardini: Indicating the yellow sheet.

“The Witness: A. Before I signed this, the San Mateo Feed & Fuel came down and found me on the jobs and I signed those assignments for them.

“Mr. Margolis: Q. You have reference to Trustee’s Exhibit No. 1, the letter, you are pointing to?

“A. That is right.

“Q. Did you see the bookkeeper or anyone from the San Mateo Feed & Fuel Company after the date of that assignment? A. No.

“Mr. Margolis: That is all.

“(Witness excused.)

“Mr. Margolis: We will call Mr. Casey.

“HAROLD E. CASEY,

called for the Trustee; Sworn.

“Mr. Margolis: Q. Mr. Casey, you will recall at the last hearing in this matter, we talked about this assignment, dated February 18, 1942?

“A. I do.

“Q. Do you remember my asking you whether you had the [75] original of that assignment?

“A. Yes.

“Q. Did you find it?

“A. No, I did not find it. It is the only one I have.

“Q. Did you ever see the original of that?

“A. I don't think I ever did.

“Q. Don't you recall testifying that the original of that was signed and left with Conway and Culligan, to whom it was addressed?

“A. I don't think I said it has been. I said I assumed it had.

“Q. You had not seen it? A. No.

“Q. Can you tell us from your records how much money and when you received the money in connection with Job No. 1172, which is the first job number on the letter which you have in your hand?

“The Witness: Have you the ledger sheet?

“Mr. Mullin: Yes.

“The Witness: A. The amount of \$28.64.

“Mr. Margolis: Q. Did you receive \$28.64?

“A. Yes, it looks like February 28.

“Q. You received \$28.64 on February 28?

“A. Yes.

(Testimony of Harold E. Casey.)

“Q. That was to cover Job. No. 1172. Is that correct? A. According to this.

“Q. Your records show you received that money. is that correct? A. Correct.

“Q. On February 28, 1942, \$28.64. Is that right? A. That is right.

“Q. On Job 1142, can you tell us how much money you received, and when?

“A. There is shown in here a couple of items which it might have been in on. One here is February 24, \$478.09.

“Q. February 24? A. Yes.

“Q. 1942? A. That is right.

“Q. Four hundred what?

“A. \$478.09. What that [76] couples up, I don't know.

“Q. You have made some pencil notations on the carbon copy of the letter dated February 18. Can you tell us whether this \$478.69 applies to any of these job numbers on the assignment?

“A. I say they do, yes.

“Q. Can you tell which ones?

“A. That is what I say. I cannot tell offhand, but they are an accumulation of these figures.

“Q. And that you received February 24, 1942?

“A. Right.

“Mr. Mullin: The amount of \$400. was received. That did not necessarily include \$67.40. It might or might not.

“Mr. Margolis: Q. Can you tell us whether \$67.40 is included in the amount of \$478?

(Testimony of Harold E. Casey.)

“A. Not from what I have here, no.

“Q. How can we ascertain that information?

“A. I don't know whether I could ascertain it or not.

“Q. Would you say you never received the \$67.40? A. No, I would not.

“Q. Would you say you did receive it?

“A. I would say we did.

“Q. All right. We will pass that for the moment. And, directing your attention to Job No. 1149, can you tell us, pursuant to the assignment of February 18, 1942, how much you received and when you received it?

“A. No, because we then go to a couple of items: \$286 and \$313.

“Q. \$286 even? A. Yes.

“Q. And what date did you receive the \$286?

“A. March 14th.

“Q. 1942? A. Yes.

“Q. And can you tell from the record whether the amount of \$204.97 is included?

“A. Yes, it is included.

“Q. It is included?

“A. It would have been [77] included in that, yes.

“Q. Directing your attention to Job No. 1112, can you tell how much you received and when you received the money?

“A. Well, that may have been in the same amount. The last was \$204.97?

“Q. That is correct.

(Testimony of Harold E. Casey.)

“A. Now you want \$219.12?”

“Q. That is correct.

“A. Well, there is another item here of \$313.08 that probably would cover that.

“Q. You received that on what date?”

“A. The \$313 was March 14th.

“Q. The same day you received the \$286 even, you received \$313.08? A. Correct.

“Q. And this money we have just referred to all came from Conway and Culligan pursuant to this assignment of February 18th. Is that correct?”

“A. Yes.

“Mr. Mullin: I move to strike the answer and object to the question on the ground that there has been no showing there was an assignment as of February 18, 1942.

“The Referee: Would there have to be under the allegations of his petition?”

“Mr. Margolis: I don't think so.

“The Referee: Whether there was an assignment or not, under certain conditions, would it make any difference?”

“Mr. Mullin: Well, he is asking about an assignment, Your Honor. It has not been established that there was an assignment.

“The Referee: What does his petition say?”

“Mr. Margolis: I think this letter, if I may interrupt, would answer that.

“The Referee: Just a minute, counsel. Which assignment are you under now?”

“Mr. Margolis: I am under the assignment that

(Testimony of Harold E. Casey.)

was executed by Mr. Scardino. This may purport to be a letter. [78] I will refer to it as the purported assignment, if that will satisfy you.

“Mr. Mullin: It is not a question of satisfying me, counsel; it is merely what is proper and what is not proper.

“Mr. Margolis: I will have the record read back. It was my understanding when this matter was first heard, I may be in error, that the original was in existence and was signed by the parties.

“The Referee: Let’s get the date of the hearing.

“Mr. Pardini: January 26th, right at the beginning of the testimony of Mr. Casey.

“The Referee: Mr. Blair, will you get the record of January 26th and let’s find where we are.

“The Reporter then read from the notes of the hearing in the above-entitled matter of January 26th, 1942, from the testimony of Harold E. Casey, who was called as a witness on behalf of the trustee, as follows:)

“ ‘Mr. Margolis: Q. Did you bring with you documents and papers in connection with any transactions had with Mr. Scardino?

“ ‘A. I brought the ledger cards showing the dates requested, December.

“ ‘May I see them, please?

“ ‘A. That is the original.

“ ‘Q. Did you bring with you any paper or document indicating an assignment of any kind from Mr. Scardino to the Casey Company?

“ ‘A. We have one here.

(Testimony of Harold E. Casey.)

“ ‘Q. May I see it? Where is the original of this, do you know, Mr. Casey? A. That is it.

“ ‘Q. I mean the one bearing Mr. Scardino’s signature?

“ ‘A. I don’t know. That is all that is in the file. This was honored and paid.

“ ‘Q. May I withdraw it from that file?

“ ‘A. Yes.

“ ‘Mr. Margolis: I will read this into the record, Your Honor: (Reading) [79]

“ ‘Mr. Pardini: That is not signed, this particular document.

“ ‘Mr. Margolis: This particular document is a copy. The date is February 18, 1942.

“ ‘Q. Can you enlighten us on this document in any respect, Mr. Casey?

“ ‘A. Well, Conway and Culligan would have the original.

“ ‘Q. Now, did you get other or additional assignments except this?

“ ‘A. There is one of these. I have a couple of those. Whether or not that is an assignment, I don’t know.

“ ‘Q. Do your records indicate, Mr. Casey, that the sum total of \$2,035.89 was collected pursuant to the assignment I have just read into the record?

“ ‘A. I think, if I remember correctly, that was subject to an adjustment. What is the amount?

“ ‘Q. \$2,035.89?

“ ‘A. Well, I know it was paid through Conway and Culligan and credited to his account.

(Testimony of Harold E. Casey.)

“Q. Did you set up a separate account for the assignment? A. Yes.’

“Mr. Margolis: Supplementing that testimony, Your Honor, with the language in the answer of the respondent here, as follows:

“‘Said bankrupt did make certain assignments to respondent herein for certain monies, which were due said bankrupt from Conway and Culligan, building contractors, and further alleges that said assignments were made in the ordinary course of business as conducted by this answering respondent and others dealing in the same type of business as respondent in the community in which respondent operates his said business; denies that respondent holds any money received pursuant to [80] any assignment, save and except the sum of Two Thousand Thirty-five and 89/100 (\$2,035.89) Dollars; denies that the monies received by respondent from said bankrupt are held by respondent without color of right or title thereto, and in this respect alleges that said sums received by respondent by virtue of said assignments were received in the ordinary course of business of respondent.’

and so forth and so forth. This is verified.

“Mr. Mullin: That is perfectly correct.

“Mr. Margolis: It is the answer of the witnesses on the stand.

“Mr. Mullin: That is perfectly correct. My objection is, you are questioning him under a purported assignment of February 18, 1942, which so

(Testimony of Harold E. Casey.)

far as I know, there has been no proof offered that the same was ever executed. My objection was to the so-called assignment unless in fact it was an assignment. I have produced an assignment of February 20th, and that, so far as I know, was the only assignment ever executed.

“The Referee: You can interrogate Mr. Casey on his answer made on the other hearing if you want.

“Mr. Margolis: Q. You heard the testimony read to you just now, Mr. Casey?

“The Witness: A. Yes.

“Q. Was that testimony correct? Did you say the original of the document you hold in your hand was in the possession of Conway and Culligan?

“A. So far as this particular document, I happened to find it in the file. Our bookkeeper made these items up for these different jobs of Conway and Culligan. Whether anything was ever signed on it, it was with no knowledge of mine.

“Q. You heard the testimony read, where you were asked what happened to the original and you said it was in the hands [81] of Conway and Culligan?

“A. When I came up that day, that was the first time I knew a bankruptcy was going on. This piece of paper was in the file and I assumed there was an original. I have checked with Conway and Culligan and they have no original of this.

“Q. You are positive of this?

“A. They have that assignment there.

(Testimony of Harold E. Casey.)

“Q. When did you last check with them?

“A. Within a week.

“Q. Then the testimony you gave here on the hearing in January is not absolutely correct?

“A. Well, from the evidence produced since, I would say it is incorrect.

“Q. Now, to what does that letter refer, this yellow letter, do you know?

“A. Well, that letter would refer to this total amount. How it was paid and what it came in on would be two different things.

“Q. It does, in fact, refer to——

“A. \$2,035.89.

“Q. It does, in fact, refer to the items of the carbon copy of February 18th, does it not?

“A. That would make up our ledger sheet, yes.

“Q. Where did the information come from that went into that letter of February 18, 1942?

“A. You mean this here?

“Q. Yes. A. Our file.

“Q. And that was done in your office, was it not?

“A. This here?

“Q. Yes. A. I could not tell you.

“Q. Do you know where it was done?

“A. No.

“Q. Do you know who prepared it?

“A. Well, it could have been prepared by us or by Conway and Culligan.

“Q. The information is accurate, is it not?

“A. Well, here is the thing: Conway and Culligan kept everything by job, what was paid on them,

(Testimony of Harold E. Casey.)

by job. Whether [82] these particular amounts of jobs were taken and checked against our total, I don't know.

“Q. You don't know?

“A. All we are interested in is the total.

“Q. Can you tell us whether that letter on the Conway and Culligan stationery referred to the document you have in your hand?

“A. It refers to the total here, \$2,035.89.

“Mr. Margolis: I think that establishes it sufficiently, Your Honor.

“The Referee: It may not establish the assignment, but it shows the amount that went there. Now, if the amount went there and the man was insolvent, and they knew he was insolvent, or had reason to believe he was insolvent, within four months—

“The Witness: Why would I?

“The Referee: I am talking to counsel at the present time. What is the answer to that, Judge Mullin?

“Mr. Mullin: My answer, may it please the Court, is that we received the sum of \$2,035.89, as set up by the answer; that the sums were received from Conway and Culligan by virtue of an assignment. It was the common practice between Mr. Casey, Scardino and other subcontractors.

“The Referee: What difference would the common practice make?

“Mr. Mullin: Just a moment, please. It would establish their custom.

(Testimony of Harold E. Casey.)

“The Referee: Custom cannot affect creditors.

“Mr. Mullin: As far as offering proof of the fact that we had no knowledge of the fact that Scardino was contemplating bankruptcy.

“The Referee: I am not deciding this case, but we have testimony that he was. He does not have to say that he is contemplating bankruptcy. All he has to say is: ‘I have no [83] money or no property with which to pay.’ Then that is either knowledge to you, or at least sufficient knowledge to give you reasonable cause to believe he is insolvent. That is why I am saying custom does not enter into it.

“Mr. Mullin: I would say that custom would enter into it by virtue of the fact that over a period of years the same type of dealings had been going on between H. E. Casey & Company and Scardino, and that checks drawn jointly to Scardino and H. E. Casey & Company by general contractors had been used. They had been honored and Scardino had remained in business and his financial condition, so far as bankruptcy was concerned, was no different so far as the knowledge of H. E. Casey & Company is concerned, on February 20th than it had been for a number of years previously.

“The Referee: I will ask you this: Suppose over a period of years, every time the bankrupt got behind, they went down and did not get an assignment, but just got money from him. Under those circumstances, would you say that custom entered into it if the last payment was within four months of bankruptcy?

(Testimony of Harold E. Casey.)

“Mr. Mullin: No, but the main objection, according to the petition here, is just that, and that alone, and the answer, that we are not bound unless we went out with knowledge of the contemplated bankruptcy of the bankrupt and, so to speak, forced him to give us an assignment. That is what I am here prepared to show.

“The Referee: Well, if it develops at the end of the hearing, if there is testimony in which he said to you: ‘I am broke; I haven’t money to pay you,’ would it make any particular difference whether it was the custom or not? That is the reason I say your custom idea is not competent.

“Mr. Mullin: Except for the fact, and I think it will be developed, that it was quite common for Scardino at all [84] times to say he was broke.

“The Referee: If he did that, it put you on notice. If you admit that, it puts you on notice.

“Mr. Mullin: But, the bills always were paid.

“The Referee: But a time did come when the bills were not paid by Scardino.

“Mr. Mullin: Yes, many people, and I think Your Honor undoubtedly has had similar matters, where a person, any time you go to collect and don’t get it, says, ‘I am broke; this, that, or the other thing.’ In fact, unless we had actual knowledge of the fact that the man in fact was broke, I don’t believe we are bound.

“The Referee: The law does not say so. It says if you have reasonable grounds to believe it. If a man says: ‘I am broke,’ that puts you on notice.

(Testimony of Harold E. Casey.)

“Mr. Mullin: Let’s stand on the reasonable grounds. If, over a period of years, the same thing had transpired, as I am prepared to prove, and the same type of discussion, ‘I am broke,’ over a period of years, but in fact the man was not broke and in fact continued to operate and was successful in his operations, would that one statement, in view of the many other statements by this man, amount to reasonable knowledge?

“The Referee: Absolutely. If you were constantly dealing with a man who said, ‘I am broke,’ and you finally got your money and the day came when he was broke, you are bound.

“Mr. Mullin: Your Honor may be correct, but I respectfully state that I cannot subscribe to that.

“The Referee: Of course, that is the reason we have litigation.

“Mr. Mullin: That is right.

“Mr. Margolis: Q. Can you tell us, Mr. Casey, with respect to Job No. 1139, how much you received and when? [85]

“Mr. Mullin: There is an objection pending.

“The Referee: The objection may be overruled.

“Mr. Margolis: Then I will repeat my question.

“Q. Can you tell us from your records, Mr. Casey, with respect to Job No. 1139?

“The Witness: A. \$31.21?

“Q. Yes, \$31.21.

“A. I cannot tell from this record. As I said before, this money came in in much larger amounts

(Testimony of Harold E. Casey.)

than shown here and were all accumulated into a total.

“Q. In order to conserve time, will you say that all these that I am referring to, the jobs listed on the document dated February 18, 1942, which you have in your hand, addressed to Conway and Culligan, would you say you received the amounts listed alongside the job numbers?

“A. That is right.

“Q. May I see your copy a moment? And, can you tell us what the total was? A. \$2,035.89.

“Q. In whose handwriting are these figures?

“A. I don't know. I was trying to make them out myself.

“Q. This was in your file?

“A. It could be Jules Mendich.

“Q. Do you recognize this handwriting?

“A. No, I don't.

“The Referee: Q. Who was that you said?

“The Witness: A. Jules Mendich.

“Mr. Margolis: Q. He was your bookkeeper?

“A. No, credit manager.

“The Referee: Q. Do you know where he is?

“A. He is in the shipyards.

“Mr. Margolis: Q. Do you know which one, Mr. Casey?

“A. I think Western Pipe.

“Q. Do you know who changed the figure that appears to be changed from some amount to \$2,035.89? A. No, I don't.

“Q. Do you know who determined that?

“A. No, I don't. [86]

(Testimony of Harold E. Casey.)

“Q. How can you tell there was received, pursuant to this figure in the document dated February 18, the sum of \$2,035.89?

“A. Because I checked the bills that constituted these numbers, the job numbers, against the bills.

“Mr. Pardini: Q. The job numbers?

“A. Yes.

“Mr. Margolis: Yes.

“The Witness: A. Against our invoices and totalled them up and got this total.

“Q. Where are those bills? Have you got them here?

“A. No, they are in our files, Mr. Margolis.

“Q. You say they are in your files?

“A. Yes.

“Q. When did you last see them?

“A. Well, I would say it was the day we were in Court.

“The Referee: The 26th of January.

“Mr. Margolis: Q. You received this trustee's petition for a turnover order?

“A. No, the original time——

“Q. I am asking another question. You received this? A. This last one?

“Q. This document entitled Trustee's Petition for a Turnover Order? A. Yes.

“Q. You received a copy of this and the order to show cause? A. Yes.

“Q. Did you read it? A. I did.

“Q. Did you read that portion which reads as follows? I am reading from page 2 of the Order:

(Testimony of Harold E. Casey.)

“‘It is further ordered, that said respondents bring with them all of their books, records, and documents covering the moneys received by them under and by virtue of the assignments referred to in said Trustee’s Verified Petition, including all of the information regarding the notices of completion in connection with the receipt of said moneys under and by virtue of said [87] assignments.’

“A. Well, I have brought that.

“Q. Are the bills still available?

“A. Yes, they are.

“Q. That give the figure of \$2,035.89?

“A. They give a figure of \$1,920.26, less a credit, if I remember correctly.

“Q. What happened to the credit?

“A. The credit was given to the account.

“Q. Did you see those payments as they came through, those you already testified to: \$28.64 on February 28, \$478.09 on February 24th, the \$286 on March 14th, and again on March 14th the \$313.08?

“A. Are you asking, did I see them?

“Q. Yes, did you see the checks as they same through?

“A. I may have and I may not. That is a long ways back. They may have been put in the bank without my seeing them.

“Q. Do you know whether you say any of those checks covering the items?

“A. Yes, because some of them came in the mail, which I may have opened. Some may have been collected from the office.

(Testimony of Harold E. Casey.)

“Q. Of Conway and Culligan? A. Yes.

“Q. Did you go by to collect any of them or did you send someone from your office? A. No.

“Q. Have you a recollection of seeing one or more of the checks representing those items?

“A. Yes.

“Q. And who was the payee on them?

“A. Ourselves.

“Q. Scardino's name was not included in it?

“A. No, it was not.

“Q. You did not need the endorsement of Scardino, that you know of? A. No.

“Q. Directing your attention again to the list on the letter dated February 18, 1942, can you tell by looking at that and comparing it with your ledger card that you have, [88] when the first payment was received in connection with these items on the letter of February 18th? When was the first payment received? A. February 24th.

“Q. That was the \$478.69? A. .09

“Q. On February 24, 1942? A. Yes.

“Q. And when was the last item received covering the job numbers and the amounts on this letter of February 18, 1942? A. April 27th.

“Q. Of what year? A. 1942.

“Q. In what amount? A. \$106.60.

“Q. Now, you received some money in January, did you not, directly from one Schmidt?

“A. Well, I could not tell from here.

“Q. Do you remember having those blue slips with you at the last hearing on January 26th?

(Testimony of Harold E. Casey.)

“A. Yes.

“Q. Where are those slips?

“Mr. Mullin: I have them here.

“Mr. Margolis: Q. I show you these two documents and ask you what they are, if you know?

“A. These are orders from Schmidt for the American Trust Company to pay us the amount of \$81.43 and \$81.43.

“Q. Under what date? A. January 15th.

“Q. Did you receive both of those amounts?

“A. No, these are still outstanding.

“Q. Now, do your records reveal a payment of \$252.35 on January 20, 1942?

“A. What amount?

“Q. \$252.35? A. In January?

“Q. Yes, January 20th?

“A. \$252.37, that is right.

“Q. \$252.35 is the amount I have.

“A. It is 37 here.

“Q. Now, was that by virtue of one of these assignments similar to the documents I just showed you? A. It could have been. [89]

“Q. I believe you had some others at the time?

“A. Have you the others?

“Mr. Mullin: Not that I have seen.

“The Witness: A. They would have been collected, that is right. It could have been.

“Mr. Margolis: Q. \$252.37, that was on what job?

“A. Well, it must have been on the Schmidt job.

“Mr. Mullin: If you know what job, Mr. Casey.

(Testimony of Harold E. Casey.)

“A. I am only assuming.

“Mr. Margolis: I will ask the Court to check back the record. I have some definite notes here wherein he testified, that on January 20, 1942, he received the additional sum of \$252.35, and another sum of \$246.50, and I have a very distinct and definite note here.

“The Referee: Very well.

“Mr. Margolis: It appears to me to be on the Schmidt job. The reason I am asking that we go back to the record, Your Honor, is my recollection of these facts is that those two items were in addition to the \$2,035.89 already testified to under the document the witness has in his hand.

“The Witness: Aren't you referring to an amount of \$262.66?

“Mr. Margolis: No. Let me refresh your memory, if I may, Mr. Casey.

“Q. I believe you testified that under the Schmidt job, on January 15, 1942, you received an assignment, which you had there, the blue document, for \$81.43 and another of the same date in the same amount, making a total of \$162.86. Your testimony in January was that this amount is still open and uncollected? A. That is right.

“Mr. Mullin: He also testified he received \$252.35.

“Mr. Margolis: \$252.37, which I have marked paid.

“Q. Your testimony being that it was paid to

(Testimony of Harold E. Casey.)

you on January 20, 1940. You also said the sum of \$256.50 was [90] already paid, meaning you had received it, that the amount was paid. Does that refresh your memory?

“A. I believe where I got that was out of a Schmidt letter in the file.

“Mr. Mullin: It may be. Here is your whole file, Mr. Casey.

“The Witness: \$252.35?

“Mr. Margolis: Q. That is the figure I asked you for.

“A. That is right. That was under the assignment on that date.

“Q. Not on this one of February 18, 1942? That was in addition to this?

“A. That is right, a blue assignment.

“Mr. Margolis: May we offer these in evidence, Your Honor, so we can refer to them properly?

“The Referee: Trustee's Exhibit No. 3, two of them, both dated January 15, 1942; one is for \$81.43 and one is for \$81.43.

“Mr. Margolis: Q. Then you did receive on the Schmidt job \$252.35 on January 20, 1942. Is that correct?

“A. Well, there is a discrepancy here of two cents. Whether that is it or not, I have \$252.35 and it shows received \$252.37. Whether it is the same thing, I don't know.

“Q. What is your best recollection of it? Where did you get the \$252.35 from?

(Testimony of Harold E. Casey.)

“A. Every notation is on a list of jobs covered by these assignments.

“Q. And the \$252.37, you got from where?

“A. From the job payments.

“Q. Well, do you think it was the same item?

“A. Well, there is a two-cent difference. It could be.

“Q. In all events, you received that money on January 20, 1942, in accordance with the record you have in your hand?

“A. I received \$252.37. [91]

“Q. Fine. Now, does your record reveal an item of \$246.50 paid to you on the Schmidt job?

“A. There is no item for that specific amount.

“Mr. Margolis: May we have a five-minute recess? I think we can conclude in another five or ten minutes.

“The Referee: She has the record right there. She can check it.

“(The reporter then read from the record of January 26, 1942, at page 171 and page 172 of notes, as follows:

“‘Mr. Margolis: Q. How many of these documents labelled American Trust Company not negotiable, did you receive from Mr. Scardino?

“‘A. The total is there, isn't it?

“‘Q. Will you find it for me? I cannot see a total on this.

(Testimony of Harold E. Casey.)

“ ‘A. Maybe it is not. You had a total of \$162.86, did you not?’

“ ‘Q. The sum total of these two items here?’

“ ‘A. All right. There is another total of \$252.35 and \$246.50. Those together would make \$661.71. Is that correct?’

“ ‘Q. That is correct.

“ ‘A. Then, the \$252.35 and the \$246.50 are the ones paid, leaving \$162.86 still open.’

“Mr. Margolis: Q. Then, there was \$246.50 paid H. E. Casey Company pursuant to one of these blue assignments?

“A. I don't think we have them in an item of \$246.50.

“Q. You do find an item of \$246.50?

“A. Yes, on the list, but I don't have a \$246 on the ledger received. Do you see what I mean? Listed on this piece of paper.

“Q. May I see the paper?

“A. See what I mean?

“Q. Yes, I see what you mean, but I believe you had another blue one.

“A. This is all we have left.

“Mr. Pardini: They pick these up when they pay.

“Mr. Margolis: Q. Does your record show you received [92] that amount of \$246.50?

“A. I could not tell from here.

“The Referee: Didn't you so testify the other day when you were here?

(Testimony of Harold E. Casey.)

“A. I might have testified we had an item of \$246.50.

“Mr. Pardini: Included in the general collections after January, 1941.

“The Witness: A. Of \$661.71.

“Mr. Pardini: Q. And among that money was \$246.50 on January 20, 1942?

“A. I have a payment here of Schmidt, \$262.66.

“The Referee: That is another payment, is it? What date?

“A. February.

“Mr. Pardini: Q. What date?

“A. February 19th.

“The Referee: You did not mention that the other day, did you?

“A. We argued over that, as I remember, trying to establish that figure. That is the way it was. You are talking of \$246 and I was talking about \$252.35.

“The Referee: You heard what the reporter read to you. That was your testimony, wasn't it?

“A. It may have been on that day.

“The Referee: You are endeavoring to tell the truth at all times, aren't you?

“A. That is right. But we were going around in a circle here trying to find a lot of items.

“Mr. Margolis: We are not going in circles.

“The Witness: A. I say we were that day.

“Mr. Margolis: Q. I will ask you this: Now, you received some money in October of 1942, also, didn't you?

(Testimony of Harold E. Casey.)

“A. October?

“Q. Yes, sir? A. Yes.

“Q. \$158.39?

“A. That was through a lien. [93]

“Q. When was the lien filed, do you know? Do your records show?

“A. Not what I have here. It was filed through a fellow by the name of Burns.

“Q. Do you know when it was filed?

“A. No, I don't.

“Q. Do the records reveal it?

“A. You can probably get it from Burns.

“Q. Would your records reveal, how much money, excluding this \$158.39, Mr. Casey, you received from February 24, 1942, to date, excluding the \$158.39? Can you give us the total?

“A. Let me have that again.

“Q. You testified that the first payment you received pursuant to this letter you have in your hand the assignment of February 20th, was a payment of \$478.09 on February 24, 1942?

“A. Yes.

“Q. All right. Now, can you give us the sum total of all the moneys you received in these matters from that date until today, excluding the \$158.39?

“A. Which one is the \$158.39?

“Q. That is the one you just mentioned that you received in October. Exclude that.

“A. Well. I would have an item of \$2,035.89.

“Q. Go ahead. I will do the figuring, you give me the items. Go ahead. Was there anything in

(Testimony of Harold E. Casey.)

addition to that?

“A. Yes, plus \$158.39 in October.

“Q. Is the item of \$252.37 that you testified you received on January 20th included in the sum total of \$2,035.89? A. No.

“Q. In other words, you received \$2,035.89 and also \$252.37, which is a separate item. Is that correct? A. There is \$252.37, yes.

“Q. And \$246.50?

“A. Well, I cannot say as to this \$246.50 now, because it does not show on here. [94]

“Mr. Margolis: We submit that the sum total of these items is \$2,534.76. The testimony so shows it and we will not take more time of the Court on these matters. We are not going to take the time of the Court to re-establish the \$246.50. I offer in evidence the testimony adduced heretofore.

“The Referee: That is before the Court.

“Mr. Margolis: Yes.

“Q. Can you get for us the information with reference to the \$158.39, Mr. Casey, when the lien was filed? You got the money in October, 1942. Is that correct?

“A. It was paid that date, yes.

“Q. Paid to H. E. Casey Company?

* The testimony referred to by the attorney representing the trustee is found in the Reporter's Transcript of the 21a examination, filed in the office of the clerk of this court on September 30, 1943, in connection with a petition for review, with reference to which comment hereinafter will be made.

(Testimony of Harold E. Casey.)

“A. That is right.

“Q. From whom did you receive it?

“A. The title company.

“Q. Do you know in connection with what job?

“A. I believe it was the Younger job.

“Q. Stanley W. Younger? There is nothing in your file that would show when the lien was filed?

“A. No, there is not.

“Mr. Margolis: That is all, Your Honor.

“The Referee: Any cross-examination, gentlemen?

“Mr. Mullin: Can we take a recess, Your Honor?

“The Referee: Yes, for about five minutes.

“(Recess)

“Mr. Pardini: Q. Mr. Casey, were there any other contractors with whom you dealt at this time on behalf of Scardino in a similar way, other than Schmidt and Conway and Culligan?

“A. With any others?

“Q. Yes.

“A. I think that is all. You mean at [95] that particular time?

“Q. Say anytime in 1942?

“A. I would be guessing on that, in 1942.

“Q. Well, about this time? I haven't the names. I had a list.

“A. But there is only a few months' period there.

“Mr. Margolis: Q. Younger was one of them?

“A. Younger was prior to that.

“Mr. Mullin: Younger was one of the lien jobs.

(Testimony of Harold E. Casey.)

“Mr. Pardini: Q. The Younger was afterwards?

“The Witness: A. No, prior.

“Q. Oh, prior?

“A. Younger was prior, in 1941.

“Q. Can you tell me from the books you now have, when was the last transaction with Younger before October, 1942? That is, before you got that \$158?

“A. I would say it was back in 1941.

“Q. Have you any record that will show that?

“A. Yes.

“Q. Here? A. No.

“Q. Now, did you have any dealings with Joe Bettencourt?

“A. Well, we sell Joe Bettencourt. Yes, we sell him ourselves.

“Q. But, you did not collect from him on any account of Scardino's? A. I don't think so.

“Q. Your record would show that, would it not?

“A. If we had sold him, yes.

“Q. Did you collect from Mr. Gus Johnson for the account of Scardino?

“A. That is still an outstanding account. Gus Johnson's is made up in the balance Scardino still owes us.

“Q. That is the general account. And have there been collections? A. No.

“Q. When was the last collection on there?

“A. In 1941.

“Q. Do you know when in 1941? A. No.

(Testimony of Harold E. Casey.)

“Q. Your record will show when the last collection was and the amount? A. Yes.

“Mr. Margolis: Q. Would the records show the amount? [96] A. Would they?

“Q. Yes, your records?

“A. They may. I told you the last time I was here, we have had quite a change in help. It is hard to tell what will show up.

“Q. Would it likewise show an assignment from Donald Johnson or to Donald Johnson from you?

“A. I could not say.

“Mr. Pardini: Q. Did you have one in the name of John L. Steiner? Have you collected any moneys from John L. Steiner for the account of Scardino?

“A. No.

“Q. At no time?

“A. No, we never had any of John L. Steiner's.

“Mr. Pardini: That is all.

“Mr. Margolis: Nothing further.

“Cross Examination

“Mr. Mullin: Q. Mr. Casey, your firm has done business with Scardino over a period of years?

“A. Yes.

“Q. Approximately how long?

“A. Oh, four or five years. I guess it dates way back to a job back in the '20's. I think it was. Then he went away and came back again.

“Q. Did you have any knowledge—I will withdraw that. When did you first have knowledge of the fact that Scardino was in bankruptcy or contemplating bankruptcy?

(Testimony of Harold E. Casey.)

“A. I never knew he was in bankruptcy until I came up here at the last hearing.

“Q. And was that under the subpoena——

“A. That was the first notice.

Q. Calling for your appearance on January 26 of 1943? A. That is right.

“Q. You were served with a subpoena to come to the hearing at that time? A. That is right.

“Q. On receipt of the subpoena by you, that was the first time you knew Scardino was in bankruptcy? A. Right.

“Mr. Margolis: I am going to object on the ground that it calls for the opinion and conclusion of the witness. [97]

“The Referee: It is a matter of fact, isn't it? I don't know what his answer will be, but it will be a matter of fact.

“Mr. Margolis: What difference would it make when he heard about it? The question is, whether he knew about it before or had reasonable knowledge.

“The Referee: That is not your objection.

“Mr. Mullin: The objection is on the ground that it calls for an opinion and conclusion.

“Mr. Margolis: I will amend the objection, on the ground that it is immaterial.

“The Referee: It may be sustained on that ground.

“Mr. Mullin: Q. Mr. Casey, did you ever know of the fact that Mr. Scardino contemplated bankruptcy?

(Testimony of Harold E. Casey.)

“Mr. Margolis: I object to that question, if it please Your Honor, on the same ground.

“Mr. Mullin: Your Honor, the allegations of the petition here and the objections seem all one-sided so far as Mr. Margolis is concerned. He is very interested in getting what he wants but objects strenuously to anything else.

“The Referee: That frequently happens.

“Mr. Mullin: But always within moderation. It so happens here that the petition alleges certain things; one of which is that certain assignments were taken with the knowledge that Scardino contemplated bankruptcy.

“The Referee: Does the petition so allege?

“Mr. Mullin: I believe it alleges that we knew at the time of the acceptance of the assignment, if I remember the content of the petition.

“Mr. Margolis: I do not allege that it was taken knowing he was contemplating bankruptcy. I will read it:

“ ‘That at the time of the assignments hereinabove referred to, said respondents knew bankrupt was [98] insolvent and caused said bankrupt to make said assignments without any consideration therefor.’

“The Referee: The objection may be sustained. If that is the allegation of the petition, you have your proper question to ask the witness.

“Mr. Mullin: Q. At the time that this assignment was made, and on February 20th of 1942, did you know that Scardino was insolvent?

(Testimony of Harold E. Casey.)

“The Witness: A. I did not.

“Q. Was there anything that would lead you to believe at that time that Scardino was insolvent?

“A. I would say no. Did you say solvent or insolvent?

“Q. Insolvent. Did you cause Scardino to make these assignments without any consideration therefor? A. Did I cause him to?

“Q. Yes.

“A. The assignment was caused by Conway and Culligan on the threat from us of a lien on their jobs.

“Q. You yourself had nothing to do with Scardino? A. That is right.

“Q. As I understand, Scardino was doing the plastering work for Conway and Culligan?

“A. That is right.

“Q. And he left some uncompleted jobs?

“A. He did.

“Q. And another plasterer took over?

“A. That is right.

“Q. What is his name? A. C. B. Anderson.

“Q. And did C. B. Anderson come to you for materials? A. He did.

“Q. And will you tell us when you first knew Scardino had stopped working on the Conway and Culligan jobs?

“A. Well, some jobs were practically due for the lien period and Culligan always made payment of those bills. The understanding was they made

(Testimony of Harold E. Casey.)

payment to us when the payments were due, the bills for payment. We said, 'If we cannot get payment, we will lien the jobs.' They said, 'You cannot lien a job, because we cannot have a lien on Burlingame Village.' [99]

"Q. Burlingame Village was a subdivision operated by Conway and Culligan?

"A. That is right. So they went out and got this assignment from Joe Scardino to pay us our bills. The arrangement for payment was made through myself and Tom Culligan, or Conway and Culligan.

"Q. Had it been your practice previous to this time to take, on the Scardino jobs and others, either joint checks, an assignment, or orders on the general contractor or owner for materials furnished by you to Scardino?

"Mr. Margolis: We object—

"The Witness: A. That was the general practice.

"Mr. Margolis: I object to the question, Your Honor, on the ground that it is totally incompetent, irrelevant and immaterial.

"The Referee: The objection may be sustained.

"Mr. Mullin: For the purpose of the record, I make an offer of proof to the effect that in the building supply industry on the Peninsula it is common practice for owners or general contractors, in payment for materials supplied subcontractors by material companies, to either make the checks payable jointly to the subcontractor and/or the various supply houses, or to take orders in favor of the material men for materials furnished on

(Testimony of Harold E. Casey.)

subcontracts, drawn against the lending institution or the financing agency, and/or to take assignments covering the amount of material supplied by the material companies to the subcontractors working under general contractors or owners; and, that that practice was followed at the time of this assignment and had been followed for a great period of time prior thereto, and the same practice continued up to the time of the cessation of building generally, due to the curtailment of building activities, due to the war, and still exists where such buildings are allowed to be constructed at the present time.

“The Referee: You have your offer for the record. [100]

“Mr. Mullin: Q. Is Scardino indebted to you at this time, Mr. Casey?

“The Witness: A. He is.

“Q. And the amount is the amount set forth in your answer, \$1,031.52? A. Yes.

“Q. Did you or not lien any of the Conway and Culligan jobs? A. Did we lien?

“Q. Yes? A. No, we did not lien.

“Q. The reason you did not lien them was what?

“Mr. Margolis: We object on the ground that it is suggestive and leading and on the further ground that it is incompetent, irrelevant and immaterial.

“The Referee: The objection may be overruled.

“Mr. Mullin: Will you please repeat the question?

“(Question read.)

(Testimony of Harold E. Casey.)

“Mr. Margolis: I object on the ground that the question is leading and suggestive.

“The Referee: He asks for his reason. How else could he get it?

“Mr. Margolis: Very well.

“The Referee: It may be overruled.

“The Witness: A. The reason why we did not lien was because they had made arrangements under this assignment to pay us \$2,035.39, if I remember right.

“Mr. Mullin: Q. The amount set up by the answer? A. That is right.

“Q. And those amounts were received by you?

“A. That is right.

“Mr. Mullin: That is all.

“Redirect Examination

“Mr. Margolis: Q. You never filed a lien on any of these jobs in controversy, did you, Mr. Casey? A. No.

“Q. Did you bring your file here in connection with all [101] the transactions with Mr. Scardino from the time you started to do business with him four or five years ago?

“A. I have a ledger sheet.

“Q. Anything other than a ledger sheet?

“A. No.

“Q. There is nothing else in the file but the ledger sheet that you brought with you?

“A. That is right, besides these papers.

“Mr. Mullin: That is the file you have been referring to, Mr. Margolis.

(Testimony of Harold E. Casey.)

“Mr. Margolis: Yes, the file he brought with him.

“Q. Have you any other assignments in your file from Mr. Scardino?

“A. We had over the period of years, yes.

“Q. Anything recently other than those to which we have referred? A. Not for this period.

“Q. Except those to which we referred?

“A. Yes.

“Mr. Margolis: That is all.

“Mr. Pardini: Q. Mr. Casey, you have been in the supply and material business a long time, have you not?

A. Yes.

“Q. And you are familiar, when you mention that you did not lien a job, you are familiar with the fact that a lien is the recourse of a material man against the owner of the property?

“A. That is right.

“Q. Who may or may not have paid his money to the contractor in chief, and in turn, that may be in the hands of the subcontractor, or if someone along the line does not pay the material man, he has what is known as lien rights?

“A. That is why we have taken the privilege of making the payments direct.

“Q. When Barrett & Hilp, for instance, buy material of you, they don't give you an order to pay direct for one of their jobs, do they?

“A. They buy direct.

“Q. Orders for payment direct to the material

(Testimony of Harold E. Casey.)

men [102] are always given where the credit question is not determined?

“A. It follows through on the subcontractor.

“Q. You have a lien right in any case where you are not paid by the subcontractor or the contractor?

“A. That is right, and in this case——

“Mr. Mullin: I don't want to seem technical, but I object to this line of questioning as entirely incompetent, irrelevant and immaterial. Those are matters of law. The Court will take judicial knowledge.

“The Referee: That is true.

“Mr. Pardini: Q. Scardino's present indebtedness is \$1,031.52, at the present time, to you?

“A. If that is the correct amount.

“Q. And what was it on January 31, 1942? Can you determine that from this ledger sheet?

“A. I should be able to.

“Q. You testified, I think, previously that it was \$4308.73 on January 26th?

“Mr. Mullin: What date?

“Mr. Pardini: On January 26th. I have a note here that Scardino then owed you, that is January 31, 1942, owed you \$4,308.73. Would your records show that?

“Mr. Mullin: \$4,308.73, from the ledger card.

“Mr. Pardini: Q. Now, have you any record that would show a checkup of how old the items of indebtedness representing the \$4,308.73 were on January 31, 1942?

“A. It is right there.

(Testimony of Harold E. Casey.)

“Q. No, this, Mr. Casey, is apparently a ledger sheet starting January 20, 1942.

“Mr. Mullin: There were earlier ones. Scardino’s account, over a long period of time, ran from \$3,700 to \$4,600, or thereabouts.

“Mr. Pardini: For the preceding year, it was about the same amount? [103]

“Mr. Mullin: There were regular credits and regular charges over that period of time.

“Mr. Pardini: But on January 31, 1942, there was \$4,309.73 due on an open account. That is all; no further questions.

Recross Examination

“Mr. Mullin: Q. Just one further question. Mr. Margolis asked you about other assignments, if you had any information regarding them. Can you tell me whether or not the other assignments were paid, referring to the earlier assignments?

“A. Those assignments had been paid.

“Mr. Margolis: I was not referring to other assignments.

“Mr. Mullin: That was my understanding.

“The Referee: That was your question, Mr. Margolis.

“Mr. Margolis: If it was, I might correct it by saying this: My notes reveal that during the last hearings these names were mentioned: Schmidt, Donald Johnson, Gus Johnson, and Stanley W. Younger. We had taken care of the Schmidt proposition with these documents which are in evidence, plus the testimony of the \$252.35 paid and the ref-

(Testimony of Harold E. Casey.)

erence to the \$246.50. We took care of the Stanley W. Younger proposition with the testimony of the lien. I had reference to Donald Johnson and Gus Johnson.

“Mr. Mullin: Mr. Casey testified previously that they comprise the amount still due. There may be some others, but those two comprise the major portion.

“Mr. Margolis: That is what I was referring to, if his file would show anything, any assignment with respect to those and whether they had been paid.

“Mr. Pardini: Of course, it is argumentative, but apparently \$1,035 is now due and owing. It was \$4,308. [104] That is, \$3,277 has been collected somewhere. Now, we have an account of \$2,534.79, roughly, which would leave some \$700, \$800 or \$900.

“Mr. Margolis: Unaccounted for. That is what I had in mind.

“Mr. Mullin: Unaccounted for?

“Mr. Pardini: It is collected. We don't know how or when, collected after January 31, 1942, by H. E. Casey Company.

“Mr. Mullin: The ledger card shows its receipt during that period.

“Mr. Pardini: That is what counsel is asking you, and whether there were dealings with other contractors. Call Mr. Scardino while he is here and we may be able to clear that up.

“(Witness excused.)

“GEORGE FERRIS,

called for the Trustee; Sworn.

“Mr. Margolis: Q. Mr. Ferris, you received some moneys from Conway and Culligan in February of 1942?

“A. We received money, but it does not specify on the sheets who it is from.

“Mr. Hoffman: I will stipulate, if Your Honor please, with Mr. Margolis that I have heretofore submitted a statement of the account taken from the records of the San Mateo Feed and Fuel Company. The bookkeeper got this account up for me and it shows that there were certain payments. It may show—it doesn't either. The inference is that the payment of February 24, which Mr. Ferris refers to there, comes from certain Conway and Culligan jobs. I have the job numbers here and they correspond with the numbers Mr. Margolis has, except his total is \$323, while the total payment shown there is \$276.15. Now, there may have been a material credit or something in there. Apparently these [105] figures are from Conway and Culligan and they show that payment made and there is a discrepancy there of some \$46. I think I would be prepared to stipulate that those moneys were received, subject to correction. It is possible the bookkeeping office can account for the discrepancy. I can send it to you.

“Mr. Margolis: That is all right. It won't be less than \$276.15.

“Mr. Hoffmann: It won't be less than \$276.15. That shows on the ledger sheet as being paid.

(Testimony of George Ferris.)

“Mr. Margolis: And it will not be more than \$323.

“The Referee: Very well.

“Mr. Margolis: Q. Do your records also show that on March 12, 1942, you received \$97.08?

“A. Yes.

“Q. On the Schmidt jobs?

“A. I don't know what job.

“Mr. Hoffmann: Going to that again: Mr. Ferris, those are figures furnished me by the office, which I furnished to Mr. Margolis. The amount shows on the ledger sheet; what the jobs were shows on this statement.

“The Witness: A. \$97.08?

“Mr. Margolis: Yes.

“Q. Now, your records also show that on February 19, 1942, you received \$237?

“A. Yes, but that check came back.

“Q. And then was repaid on October 27, 1942?

“A. Right.

“Q. On February 10th, \$180? A. \$189.

“Q. Was that January 1st, the \$189, Mr. Ferris?

“A. No, February 10, cash \$189.

“Q. On the Steiner job at Burlingame?

“A. Mr. Hoffman might have that.

“Mr. Margolis: There has been an error in copying that, because the original sent me was \$180. There are two [106] items: One of \$180 and one \$189.

“Mr. Hoffmann: There is an error there some place. \$189 is what you show on the ledger?

(Testimony of George Ferris.)

“A. Yes.

“Mr. Margolis: Q. And on January 1st do you have a payment there, Mr. Ferris? A. \$189.

“Q. And December 30, 1941? A. \$46.12.

“Mr. Margolis: Will you stipulate, Mr. Hoffmann, in the interest of saving time, that the amount of \$1,025.37, subject to correction, for the Conway and Culligan jobs, were moneys received by your client, The San Mateo Feed & Fuel Company, between December 29, 1941, and the date of the filing of the petition?

“Mr. Hoffmann: That is what the figures show; I have not added them.

“Mr. Margolis: I am just taking these two items.

“Mr. Hoffmann: I will stipulate that is what the figures show, but I won't stipulate to your mathematics.

“Mr. Margolis: \$1,025.35.

“Mr. Hoffmann: Well, it shows on December 30th \$46.12; January 1st, \$189; January 10th, \$189.

“Q. Is that \$189, Mr. Ferris?

“A. Well, \$187.

“Mr. Hoffmann: Q. The Steiner job on February 19th, \$237?

“A. Yes, that was returned.

“Q. But was subsequently paid, the check made good? A. Yes.

“Mr. Hoffmann: Conway and Culligan, \$276.15?

“A. Yes.

“Mr. Hoffmann: The two Schmidt jobs, \$97.08.

(Testimony of George Ferris.)

And that stipulation is subject to my check with the office girl to see how she designated 'Schmidt' and so forth to each job. I assume it is correct, but I want to check.

"Mr. Margolis: All right.

"Can Mr. Ferris state what the record shows as to how much he received between December 29 and the time the schedules [107] were filed April 29th?

"Mr. Hoffmann: We can show the balance here. What date *to* you want?

"Mr. Margolis: December 29.

"Mr. Hoffmann: On December 29 the balance Scardino owed was \$1,457.96. Now, there were charges almost daily, you see, following that. What was the last date you wanted?

"Mr. Margolis: April 29th or the last entry.

"Mr. Hoffmann. The last entry we have is March 24 and it shows a balance due then, March 24th, this check is carried over, so on March 24th the balance would be \$1,009.11. During that period the highest balance that he owed was on February 10th; that was \$1,838.26. I mean, there is a debtor and creditor relationship running all through there.

"Mr. Margolis: Q. Now, Mr. Ferris, were these collections from the Steiner jobs and the Schmidt job and the Anchor Salon job handled in the same fashion that the Conway and Culligan payments were handled, do you know?

"The Witness: A. They were handled by our collection man. He had to go after them all.

(Testimony of George Ferris.)

“Q. Do the records reveal that you have any assignment there?

“A. No, Mr. Hoffmann had any assignments we had.

“Mr. Hoffmann: I have here, and I have had a careful check made of the assignments; the assignments are all dated February 17, 1942. One is to John L. Steiner, one to Gus Johnson—none of them are paid.

“Mr. Margolis: None of them?

“Mr. Hoffmann: No.

“Mr. Margolis: Don't these amounts refer to those?

“Mr. Hoffmann: No, these are dated February 17th; and Donald Johnson.

“Mr. Margolis: I will make a list of these later. In [108] the interest of time.

“Mr. Hoffmann: I can forward you this.

“Mr. Margolis: I will appreciate that.

“Mr. Pardini: Give the **total**.

“Mr. Hoffmann: There are seven, totalling \$1,006.17.

“Mr. Margolis: Do your records show whether there was an assignment from Scardino to Conway and Culligan on this \$276.15, Mr. Hoffmann?

“Mr. Hoffmann: No. We had no assignment whatever from Conway and Culligan. The only assignment that I know of is the assignment in evidence which Mr. Mullin showed me the other day. It did not come to our files, evidently it was made without the knowledge of anyone from the

(Testimony of George Ferris.)

San Mateo Feed & Fuel Company, unless it was the credit manager.

“Mr. Margolis: Any assignment made——

“Mr. Hoffmann: The only answer was, the payments were paid subsequent to the date of the assignment, the payments we were discussing on the Conway and Culligan jobs.

“Mr. Margolis: That is what I had in mind.

“Mr. Hoffmann: Apparently they were received subsequent to that assignment, but no one in the San Mateo Feed & Fuel Company knew of the existence of the assignment. You remember when you phoned me I told you there was no assignment.

“Mr. Margolis: Would you stipulate that this \$276.15 was received by your client directly from Conway and Culligan pursuant to this assignment?

“Mr. Hoffmann: No, I won't.

“Mr. Pardini: You will stipulate it was received afterwards?

“Mr. Hoffmann: There is no question of that; the record shows that.

“Mr. Margolis: Q. Were you in the office of Conway and Culligan when this was prepared, Mr. Ferris? [109]

“The Witness: A. No, sir.

“Q. Did you know anything about it?

“A. I never knew Mr. Conway or Mr. Culligan. I don't know either one.

“Q. Do you know whether someone connected with your firm was in Conway and Culligan's office?

“A. Possibly our credit man was.

(Testimony of George Ferris.)

“Q. What is his name?

“A. John De Monte.

“Q. Do you know where he is now?

“A. No, sir.

“Q. Do you know where he is employed?

“A. No, sir.

“Q. Do your records show his last known address? A. Yes.

“Mr. Margolis: I wonder if you would supply that?

“Mr. Hoffmann: Isn't that his address on those records? I think that is what the girl told me.

“The Witness: A. Maybe that is who it is. I don't know. It does not give his name.

“Mr. Hoffmann: I think he was working at the Southern Pacific. I think that is what the girl told me, because I asked her that myself.

“Mr. Margolis: In all events, the record shows that \$276.15 was received by the San Mateo Feed & Fuel Company subsequent to the execution of the assignment. There is no question of that.

“Mr. Hoffmann: Well, the assignment is dated February 20th and the payment was received February 24th. There cannot be much question about it.

“Mr. Margolis: That is De Monte?

“The Witness: A. That is De Monte.

“Mr. Margolis: Q. What is his first name, do you know? A. John.

“Mr. Margolis: I believe I will offer these in evidence and ask that they be marked.

“The Referee: Trustee's Exhibit No. 4. [110]

(Testimony of George Ferris.)

“Mr. Margolis: Copies of seven documents.

“The Referee: Very well.

“Mr. Margolis: That is all.

“Cross Examination

“Mr. Hoffmann: Q. Mr. Ferris, this assignment dated February 20, 1942, purporting to have been drawn by Conway and Gulligan, mentioning the San Mateo Feed & Fuel Company, that is the assignment you referred to as never having seen before?

“A. Yes.

“Q. It was not in your possession?

“A. No.

“Q. It was not until I advised you of the existence that you knew of it? A. No.

“Q. There are no further assignments in the file from Conway and Gulligan?

“A. I don't think so.

“Q. So far as you know no money was paid pursuant to the assignment? A. No.

“Q. The only assignments you had were those just offered by the trustee? A. Yes.

“Q. And no moneys were received on account of them? A. No.

“Q. You have known Mr. Scardino a number of years, have you not?

“A. Oh, yes, a matter of six or seven years.

“Q. You have done business with him over that period of time? A. Yes.

“Q. Have your business relationships been dif-

(Testimony of George Ferris.)

ferent, were they any different in February of 1942 than at any other time?

“A. Not as far as I know.

“Q. By the way, what is your capacity with the San Mateo Feed & Fuel Company?

“A. Vice president and general manager.

“Q. You have charge of the three offices. Is that [111] correct? A. Yes.

“Q. Supervision of the credits? A. Yes.

“Q. Did you know of, or did anyone ever report to you any insolvency of Mr. Scardino?

“A. No.

“Q. Your relationship with him was as it had been over the past few years? A. Yes.

“Q. By the way, the San Mateo Feed & Fuel Company was not listed as a creditor, either, were they, in the bankruptcy proceedings?

“A. That I don't know.

“Mr. Hoffmann: The record would show.

“The Referee: The record would show.

“Mr. Hoffmann: Q. You never filed a claim, did you? A. No.

“Mr. Hoffmann: I think that is all.

“Redirect Examination

“Mr. Margolis: Q. How long did Mr. De Monte work for you, Mr. Ferris?

“A. I should judge about a year.

“Q. And what was his title?

“A. Credit Manager.

“Q. He discussed all matters with you in connection with these accounts?

(Testimony of George Ferris.)

“A. As a rule he did, as a rule.

“Mr. Margolis: That is all.

“Mr. Pardini: Q. You know, of course, Mr. Casey of the H. E. Casey Company, don't you?

“A. Yes, sir.

“Q. You stated here, that so far as you know, there are no other assignments in your possession other than those counsel has given us. No other than those in your possession?

“A. Not that I know of.

“Q. You yourself did not go after the collections of the bills, did you? A. No, sir.

“Q. You had somebody else do that. For how many years before 1942 did you have other people collect your bills for you, that is, out of your office, just as a special [112] officer for that purpose?

“A. Oh, I should judge ten years that I know of.

“Q. So far as you know you never got on any single day during all the time you did business with Joe Scardino, you never got a list of assignments such as this, did you? A. No.

“Q. I think it is your testimony that you had nothing to do actually with getting this assignment, someone else got them, probably Mr. De Monte?

“A. Probably.

“Q. You don't know the occasion or who was present when they were signed, do you?

“A. No.

“Q. Or the reason he had them signed? You don't know that? All that would be in charge of the credit manager who was being paid to protect the

(Testimony of George Ferris.)

company of which you are vice president and general manager? I mean, with which you are connected?

“A. We were leaving it to his judgment. That is what he was paid for.

“Mr. Pardini: I think that is all.

“Mr. Margolis: That is all, Your Honor.

“(Witness excused)

“Mr. Mullin: Just one more question I want to ask Mr. Casey.

“HAROLD E. CASEY,

“Recalled for Respondent;

“Direct Examination

“Mr. Mullin: Q. Did Mr. Scardino ever tell you, Mr. Casey, around the date of this assignment or immediately prior to that, that is, February 20th, did he ever tell you he was broke or could not pay his bills?

“A. He did not.

“Q. Have you filed a claim against the estate here for \$1,035?

“A. You mean in bankruptcy? [113]

“Q. Yes? A. No, I have not.

“Mr. Pardini: May I, with the Court's permission, ask a couple of questions?

“The Referee: How long are you going to be?

“Mr. Pardini: One minute.

(Testimony of Harold E. Casey.)

“Cross Examination

“Mr. Pardini: Q. You also had collection and credit managers in your business?

“A. That is right.

“Q. During all the time here involved?

“A. That is right.

“Q. And Mendich was one of them?

“A. That is right.

“Q. And he was the man who drew up the assignments in question, if they were drawn up?

“Mr. Mullin: Wait a minute. Which assignment?

“Mr. Pardini: Q. He would have had charge of regulating the credit of anyone who owed you money?

“A. No, because I always was advised of what was going on.

“Q. Did you ever, before this time, get a batch of assignments such as have been introduced in evidence, from Mr. Scardino?

“A. I would say we had, yes.

“Q. That many in a single day?

“A. Oh, no.

“Q. As on the single date, February 17th?

“A. But assignments.

“Q. Or orders on specific jobs. Never before had you gotten that number from Mr. Scardino?

“A. I did not get any numbers.

“Mr. Mullin: We have no other assignment except the first letter from Conway and Culligan.

“Mr. Pardini: Q. You don't know whether

(Testimnoy of Harold E. Casey.)

Mr. Mendich drew these up or got them up himself?

“A. Yes, I was there the morning this all went on.

“Q. You say you knew about it? [114]

“A. I knew about the letter.

“Mr. Pardini: I would like this marked for identification.

“Mr. Mullin: That one never has been executed.

“The Referee: Trustee’s Exhibit ‘A’ for Identification.

“How long will you be when you take this up again?

“Mr. Mullin: I thought we were concluded.

“Mr. Margolis: Concluded.

“The Referee: How many days do you want to brief it?

“Mr. Margolis: Ten and ten.

“The Referee: Ten, ten and five.

“(Submitted 10-10-5)”

(See original of said Reporter’s Transcript on file in the office of the Clerk of this Court.)

On September 15, 1943, the following order was entered herein:

“This matter comes before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed & Fuel Co., a corporation, represented by F. E. Hoffmann, Esq., the answer of H. E. Casey Com-

pany, represented by Hugh F. Mullin, Jr., Esq., and the evidence taken upon said petition, order to show cause and said answers. The matter having been submitted on briefs, and the briefs having been filed and considered by the court in connection with the allegations of the petition, the answers thereto, and the evidence offered and received in connection therewith, and the court being fully advised in the premises. finds that no proof has been offered and/or received showing that, at the time either of the assignments referred to in said petition was made by said bankrupt, the aggregate of the [115] property of said bankrupt, exclusive of any alleged property which said bankrupt may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, if such said bankrupt did, then was not, at a fair valuation, sufficient to pay his debts.

“Upon the record presented herein, the court concludes as a matter of law that such trustee, upon the petition and order to show cause now before the court, is not entitled to a turn-over of any part of the money referred to in either of the assignments referred to in said petition.

“It, Therefore, Hereby Is Ordered, Adjudged and Decreed that the trustee’s said petition be, and it is, Dismissed, and that the order to show cause based thereon, be, and it is, Discharged, without prejudice, in each instance, to said trustee’s, within ten (10) days from date hereof, taking such further

steps as said trustee may be advised in connection with each of said assignments, by virtue of the provisions of Section 70(e) of the Bankruptcy Act.

“Dated: September 15th, 1943.

“BURTON J. WYMAN

“Referee in Bankruptcy”

(See original of said order on file in the office of the Clerk of this Court.)

Thereafter, and on September 24, 1943, the following verified petition for review was filed with me on behalf of the trustee:

“Now comes your petitioner G. S. Hayward and respectfully represents:

“That the above named Bankrupt filed his voluntary [116] petition in Bankruptcy on April 29, 1942, and was duly adjudicated a Bankrupt by the above entitled court on April 30, 1942. That thereafter and on May 21, 1942, your petitioner was duly appointed Trustee of the estate and effects of said Bankrupt, and ever since said date she has been and now is the duly appointed, qualified and acting Trustee of the estate and effects of said Bankrupt.

“That on April 2, 1943, petitioner filed her duly verified petition for an Order to Show Cause to issue requiring the therein named Respondents H. E. Casey Company and San Mateo Feed & Fuel Co., to appear and show cause before said Referee in Bankruptcy, why an order should not be made directing said Respondents to turn over, to peti-

tioner as such Trustee, certain money paid to them and each of them by the Bankrupt within four months of the filing of his petition in Bankruptcy, on the ground that said payments constituted voidable preferences. That said Respondents respectively filed their duly verified answers to Trustee's said petition and appeared pursuant to said Order to Show Cause before said Referee in Bankruptcy.

“That a hearing thereon was had on April 12, 1943, before said Referee in Bankruptcy and the matter was thereafter submitted on briefs filed in these proceedings. That said Referee in Bankruptcy on September 15, 1943, made his Order denying the prayer in said petition, in the manner following:

[Order referred to omitted for sake of brevity, said order hereinbefore being set forth in full.]

“That said order is erroneous and petitioner is aggrieved thereby in the following particulars:

“That to permit said order to stand would unjustly deprive Bankrupt's remaining creditors of their fair and equitable share in the assets of his estate, and unjustly [117] enrich Respondents.

“That there is sufficient testimony in the record to support a finding of the Bankrupt's insolvency. The record is replete with uncontradicted testimony showing facts and circumstances from which the court could and should have drawn the inference of the Bankrupt's insolvency at the times the several preferences were made to the Respondents. The manner in which the preferences were obtained, the activities of Respondents and their respective agents, and the information they and each of them

were in a position to ascertain and in fact did ascertain, all tend to support the Bankrupt's insolvency.

"To supplement and further support the fact of Bankrupt's insolvency, your petitioner respectfully makes the following offer of proof:

"Petitioner offers to prove:

"1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

"2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.

"3. That Respondents had reasonable cause to believe [118] Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

"4. That by the very manner in which Respondents obtained the preferential payments, and their

activities leading up to their *acquiring* said payments, Respondents knew they were obtaining preferences.

“That said offer of proof is supported by the affidavit of Joseph Louis Scardino, the Bankrupt herein, and the same is hereto attached and made a part hereof.

“It is respectfully urged that these proceedings be certified to the United States District Court Judge, as in such cases made and provided, for a consideration of said order and the same be reversed, or in the event said United States District Court Judge should, under all of the facts and circumstances contained in the record and upon the consideration of those herein set forth, deem it proper in the premises that this matter be remanded to the Referee, then the record herein and the proceedings thereunder be returned to said Referee with instructions to take such further and other proceedings in accordance with Section 2.a(10) of the Bankruptcy Act, as may be proper in the premises.

“Wherefore, your petitioner prays for a review of said Order by the United States District Court Judge, and upon the consideration thereof, said Order be reversed, or should it appear to said United States District Court Judge that this matter is within the purview of Section 2.a(10) of the Bankruptcy Act, and should said Judge deem it proper, then the record herein be returned to the Referee with instructions for further proceedings

as may be appropriate in the premises, and for such other and further order for which no previous application has been made.

“G. S. HAYWARD

“Petitioner

“MAX H. MARGOLIS

“Attorney for Petitioner.”

[119]

[Verification omitted for sake of brevity.]

The affidavit hereinbefore referred to is as follows:

“AFFIDAVIT OF JOSEPH LOUIS SCARDINO

“United States of America

Northern District of California

City and County of San Francisco—ss.

“Joseph Louis Scardino, being first duly sworn, deposes and says:

“That I am the person named and described in the above entitled proceedings; that I filed my duly verified, voluntary petition herein on April 29, 1942, and was duly adjudicated a bankrupt by the above entitled Court on April 30, 1942.

“That for many months prior to February 16, 1942, my business as a plaster-contractor was steadily getting worse and a *a* short time prior to that date, I called upon my attorney for counsel and advice regarding my general business affairs and the pressure being exerted upon me by several of

my creditors, discussed with him the matters covering certain tax liabilities and the possible filing of a voluntary petition in bankruptcy, and left with him for inspection whatever books, records, papers and documents I then had, a portion of which had theretofore been placed for safe keeping in a friend's garage under lock and key and when the door of the same was inadvertently left unlocked, said portion of said records were chewed up, mutilated and destroyed by a dog. That my attorney prepared my said voluntary petition and the accompanying schedules which I verified under oath on said February 16, 1942, and the same were duly filed as aforesaid on April 29, 1942. That for some time prior to said February 16, 1942, and up to and including said April 29, 1942, my attorney conducted [120] negotiations with creditors to whom I was indebted for wage claims and with other creditors to whom I was, and continued to be indebted for various taxes, all tending toward the settlement and liquidation of the same but without effect.

“That during the conferences had with my attorney, and within four (4) months of the filing of my said petition, I informed him that I was being hard pressed by certain of my general creditors and was requested to and did make substantial payments to H. E. Casey and Company, and San Mateo Feed & Fuel Co., also that they and each of them requested me to execute certain assignments conveying moneys due to me from one of my general con-

tractors, and when I informed him that by virtue of said assignments and the payments made to them, their respective claims would be paid in full, and that there might possibly be a credit coming to me, I was advised that their names need not be listed in my schedules among the unsecured creditors or otherwise.

“That within four (4) months of the filing of my said petition, and more particularly between December 30, 1941, and March 12, 1942, inclusive, said San Mateo Feed & Fuel Co., received the total sum of \$1025.35 from me and from persons who were indebted to me in my operations as a plaster-contractor; and during said four (4) months period, and more particularly on or about January 20, 1942, and between February 18, 1942, and about March 14, 1942, said H. E. Casey and Company received the total sum of \$2534.76 from me and from persons who were likewise indebted to me in my said operations as a plaster-contractor; that during said times and on each of said dates respectively, the total fair market value of all my property, both real and personal, not including the afore-said amounts paid to said creditors, was not sufficient [121] to pay all of my debts. That on each of said dates the total of all my debts, exclusive of the amounts owed to said creditors herein named, was the approximate sum of \$3227.42. That on each of said dates the fair market value of all of my assets did not exceed the sum of \$850, made up of the following: an unimproved piece of real prop-

erty located at 9th and Bayshore Highway, San Mateo, California, standing of record in my name and the name of my wife, Nettie Scardino, as joint tenants, the fair market value of which was \$250; a 1935 Chevrolet Truck, (1½ Tons), the fair market value of which was \$150; cash on deposit with the Bank of America N. T. & S. A., San Mateo Branch, San Mateo, California, in the approximate sum of \$50, held under a writ of attachment which was levied more than four (4) months prior to the filing of my said petition, and which was paid over to the State Compensation Insurance Fund on or about April 20, 1942, pursuant to a writ of execution issued out of the suit brought against me by said Fund; my tools, plaster boards, two water hoses, two hoes, mortar boards, mixing box, and mixed tools, the fair market value of which was \$400, and which I claimed exempt.

“That during said four (4) months period and for many months prior thereto the credit managers of both of said creditors called upon me frequently and I advised them of my insolvent condition. Notwithstanding, they arranged with my general contractors that all moneys which were due and owing to me should be paid by checks drawn payable to me and them respectively, all without my consent and against my wishes and instructions.

“That I ceased operating my business as a plaster-contractor during the latter part of January, 1942, due to my financial inability to carry on the same, and this fact, [122] was at the time, well

known to both of said creditors. That for at least thirty (30) days prior to said latter part of January, 1942, one Bud Murray, connected with said San Mateo Feed & Fuel Co., called on me twice and three times weekly regarding payment of my account with his firm, and I repeatedly advised him of my financial condition and informed him that I intended to and did close my business in January, 1942.

“That at no time, nor upon any date, between December 30, 1941, and the date of the filing of my petition in bankruptcy on said April 29, 1942, was the aggregate of all of my property at its fair market value, exclusive of the sums conveyed to the two creditors as aforesaid, sufficient in amount to pay all of my debts outstanding as of said time or times, date or dates.

JOSEPH LOUIS SCARDINO

“Subscribed and Sworn to before me this 23rd day September, 1943.

LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.”

(See original of said petition for review, with affidavit attached, on file in the office of the Clerk of this Court.)

On September 30, 1943, the referee's certificate and report on said order of September 15, 1943, was filed with the District Court. In said last men-

tioned certificate and report, on pages 11 and 12 thereof, under the heading, "Discussion By and Opinion of Referee," the [123] following language appears:

"At the time I entered the complained-of order, I was of the opinion that, upon the evidence presented on April 12, 1943, as such evidence is shown by the Reporter's Transcript, (handed up herewith as a part of this certificate and report), there was no order which legally I could enter other than the one dismissing the trustee's petition and discharging the order to show cause based on said petition. However, with the record in its present state—and I refer particularly to the affidavit of the bankrupt attached to the aforesaid petition for review—I am of the opinion that the court, in the interest of equity and justice, particularly, so far as creditors' rights are concerned, and also in the exercise of sound discretion, is authorized by law to return the herein records, and the matters covered thereby, to me, as the referee in charge of these proceedings, with instructions to take such further proceedings as are warranted in the premises.

"As legal justification for such procedure, see section 2a(10) of the Bankruptcy Act [11 USCA, §11a(10)]."

(See original of said last mentioned certificate and report on file in the office of the Clerk of this Court.)

On October 4, 1943, the following order was entered in the District Court:

“This matter came on regularly this day for hearing on the Referee’s Certificate on Petition for Review, whereupon the Court ordered that the Record of Proceedings [124] herein be returned to the Referee for further proceedings, in accordance with his request and Title 11 U.S.C.A., Section 11 (10).”

(See original of said order on file in the office of the Clerk of this Court.)

Thereafter, and on November 22, 1943, after due notice to interested parties, the aforesaid petition for turn-over order came on for further hearing before me, at which time there appeared, Max H. Margolis, Esq., the attorney for the trustee, Julian Pardini, Esq., the attorney for the bankrupt, F. E. Hoffman, Esq., the attorney for San Mateo Feed & Fuel Co., and Hugh F. Mullin, Jr., Esq., the attorney for H. E. Casey Company. During the course of said hearing, the following proceedings were had:

“JOSEPH L. SCARDINO,

“Called for Trustee, Sworn:

“Mr. Margolis: This matter comes before Your Honor pursuant to notice served upon the Respondents, San Mateo Feed & Fuel Company, a corporation, and H. E. Casey & Company, for further hearing of the Trustee’s petition for a turn over order. There was considerable argument made and reference made to the bankrupt’s schedule, both in oral argument by counsel for the Respondents, and

(Testimony of Joseph L. Scardino.)

in the written memoranda. We, therefore, ask at this time, if it please Your Honor, that the petition and schedules be introduced in evidence and marked as a portion of the record, by designating it Trustee's Exhibit 'A'.

"The Referee: They are part of the record anyway.

"Mr. Margolis: Yes, but I would like to offer them in evidence, Your Honor.

"The Referee: You don't have to do it. Under the Federal rule, they are before the Court and the Court will take into consideration everything in the record. [125]

"Mr. Margolis: Very well.

"Mr. Margolis: Q. You will recall that in the testimony you gave on several occasions in this matter, you made references to several of the credit managers representing the Respondents, H. E. Casey & Company and San Mateo Feed & Fuel Company? A. Yes.

"Q. You mentioned in your affidavit, one Bud Morrow?

"A. That was a fellow that worked for San Mateo Feed & Fuel; he manufactured the stucco.

"Q. He manufactured the stucco? A. Yes.

"Q. And, what connection did you have with him?

"A. He used to come around on my jobs and try to collect some money.

"Q. Did you purchase the stucco from the San

(Testimony of Joseph L. Scardino.)

Mateo Feed & Fuel Company through Mr. Morrow?

“A. I didn’t get you.

“Q. Did you purchase the stucco from the San Mateo Feed & Fuel Company through Mr. Morrow?

“A. Yes, I used to buy through Morrow and he gave the order to the office.

“Q. He was the one, you say, who manufactured the stucco for San Mateo Feed & Fuel Company?

“A. Yes, sir.

“Mr. Hoffmann: Just a minute, Your Honor. We object to this line of questioning until there is some evidence of agency shown between Moore and San Mateo Feed & Fuel Company.

“Mr. Margolis: This is just preliminary.

“The Referee: Can you connect it?

“Mr. Margolis: I don’t know whether I can connect it directly by this witness or whether I will have to call Mr. Ferris.

“The Referee: It may be admitted subject to being [126] connected.

“Mr. Mullin: I don’t want to interrupt, if it please the Court, but I want to interpose an objection so far as this is concerned, dealing with H. E. Casey & Company.

“The Referee: Very well.

“Mr. Mullin: That goes to the entire line.

“The Referee: Yes.

“Mr. Margolis: Q. Did you at any time give checks or cash to Moore? A. I gave checks.

“Q. To Moore?

(Testimony of Joseph L. Scardino.)

“A. The check was made jointly.

“Q. Jointly to whom, San Mateo Feed & Fuel?

“A. Yes, and to me.

“Q. Where did you get those checks from?

“A. From the General Contractor. I cannot remember from who.

“Q. To you remember on how many occasions you gave payments to Morrow that way?

“Mr. Hoffman: For your own information, the man's name is not Morrow, but Moore.

“Mr. Margolis: Thank you very much.

“Mr. Hoffmann, representing the San Mateo Feed & Fuel Company has corrected me. He says the man's name is not Morrow, but Moore. We will ask that the entire record, where reference is made to ‘Morrow’, be corrected to read ‘Moore’, particularly the bankrupt's affidavit on file; that every place where the name ‘Morrow’ appears, it be changed to read ‘Moore’.

“Q. How long have you known Moore?

“A. I know him since late 1937.

“Q. Was he connected with San Mateo Feed & Fuel Company, to your knowledge at that time?

“A. No.

“Q. And, do you know when he became connected with San Mateo Feed & Fuel Company?

“A. I could not tell.

“Q. Approximately?

“A. I cannot tell exactly, [127] but I would say around 1940 or late 1939; around there; I could not say exactly.

(Testimony of Joseph L. Scardino.)

“Q. You just testified you gave Mr. Moore a check made payable to you and San Mateo Feed & Fuel Company jointly? A. Yes.

“Q. And that you obtained the check from one of your General Contractors? A. Yes.

“Mr. Hoffmann: Can we get the time of the check and by whom drawn?

“The Referee: He says he cannot remember by whom it was drawn.

“Q. Can you give the date?

“A. I cannot remember. It was 1940, 1941. He used to come pretty nearly every week and see me about money.

“Q. That was 1940 or 1941? A. Yes.

“Q. Which?

“A. Well, it was in both years, late 1940.

“Q. You gave him checks both years?

“A. Two or three times I gave him a check to bring in the office.

“Q. In 1940 and 1941? A. That is right.

“Mr. Margolis: Q. You say you gave him two or three checks? A. That is right.

“Q. Drawn payable to you and the San Mateo Feed & Fuel Company?

“A. Yes. A couple of times I think I gave him some cash too.

“Q. And those moneys were credited to your account at the San Mateo Feed & Fuel Company?

“A. Yes.

“Q. You say in your affidavit that you spoke with Mr. Moore in January of 1942?

(Testimony of Joseph L. Scardino.)

“Well, he came around in 1940 and told me that he had to have some money.

“Q. For whom did he tell you he had to have some money? [128]

“A. For San Mateo Feed & Fuel Company.

“Q. What did you tell him at that time?

“A. I tell him I haven't; I am broke; I got no money and unless I collect, I cannot give you another penny.

“Q. Tell me, did you speak to him about closing up your operations at that time? A. Yes.

“Q. When was that?

“A. It was around January, 1942; it would be January 15th, something like that, you know. I cannot exactly say the date.

“Q. When did you actually close your operations? Do you know?

“A. Somewhere in February.

“Q. Of 1942? A. Yes.

“Q. At the time you made these payments to San Mateo Feed & Fuel Company and to H. E. Casey & Company, was the value of all the property you had sufficient, at its fair market value, to pay all the debts that you had?

“A. No, sir.

“Mr. Mullin: To which I object, if it please the Court. There is no showing that payments were made to H. E. Casey & Company.

“The Referee: Subject to connecting it, the objection is overruled.

“Mr. Margolis: No payments made?

(Testimony of Joseph L. Scardino.)

“The Referee: Yes. He claims that the man was not even up to try to collect.

“Mr. Margolis: There is testimony here in the record already that these moneys were received.

“The Referee: I understand that, and the objection is overruled, subject to your connecting it. Now, you can connect it by prior testimony or subsequent testimony.

“Mr. Margolis: I do not understand that I have to go over the testimony heretofore offered.

“The Referee: I am saying right now, you can connect [129] it by prior testimony or subsequent testimony. If you are satisfied with the record as it stands, then it will be up to me to determine whether or not it is correct.

“(Question and answer read.)

“Mr. Margolis: Q. You recall testifying at the prior hearings we had that moneys were paid to H. E. Casey & Company and to the San Mateo Feed & Fuel Company from the General Contractors. Do you recall that?

“The Witness: A. Yes, sir.

“Q. Moneys paid between December 29, 1941 and April 29 of 1942? A. Yes.

“Q. Do you recall testifying to that?

“A. That is right.

“Q. Do you recall testifying that demands were made by H. E. Casey & Co. and San Mateo Feed & Fuel Company of your General Contractors to make checks payable, not alone to you, but to them and to you? Do you remember that?

(Testimony of Joseph L. Scardino.)

“A. Yes.

“Q. Now, on any of the dates during the period between December 29, 1941 and April 29, of 1942, was the sum total of all the property you had, exclusive of the payments which were made to Casey & Company and San Mateo Feed & Fuel, sufficient to pay all of your then liabilities?

“A. No, sir.

“Mr. Margolis: You may cross examine.

“Cross Examination

“Mr. Hoffmann: Q. Mr. Scardino, you say that between December and April the San Mateo Feed & Fuel Company and the Casey Company asked you to make checks payable jointly to themselves? That is, that your debtor make checks payable to San Mateo Feed & Fuel Company and yourself?

“A. I signed an assignment, according to the last time the check was made to them. [130]

“Q. All right. Your response to the question of your counsel here is, that between December, 1941 and the date you went into bankruptcy in 1942, the San Mateo Feed & Fuel Company, for one, asked that the checks drawn for work that you had done be made payable jointly to themselves and you. Is that correct?

“A. I don't know, because they were made long before.

“Q. Sure. They had been made like that for three or four years before, hadn't they?

“A. No, no.

(Testimony of Joseph L. Scardino.)

“Q. You testified earlier they were made like that in 1940 and 1941? A. What?

“Q. Joint checks?

“A. The checks was made, I don't remember when it started jointly, because they went to the General Contractors and told them to make the check jointly.

“Q. When did they do that?

“A. I don't know. Ask them.

“Q. They had been doing it for a period of three or four years, hadn't they?

“A. No, it was lately.

“Q. They had been doing it in 1941?

“A. Yes.

“Q. Hadn't they?

“A. Not all; not all the General Contractors, several; one on the Schmidt, one on the Young, one on another one. They told them don't make checks for the first payment to me; make joint.

“Q. That had been going on for a year or so before?

“A. No, not a year before; probably four months, six months, five months, whatever it was.

“Q. Is it not the fact that Conway & Culligan started doing business with you that way in 1937?

“A. Conway & Culligan is separate, because all Conway & Culligan checks, he was operating on that line without anybody asking.

“Q. And had been since 1937? [131]

“A. He was doing it all the time. Not just with me, but every one of the sub-contractors.

(Testimony of Joseph L. Scardino.)

“Q. You never objected to that way of doing business? A. Yes, I did.

“Q. To whom?

“A. Well, I told to the manager and collector they should not do, because they spoil my business, I get no credit from those general contractors any more.

“Q. Did you ever make an objection to Mr. Culligan of that firm?

“A. I don't remember. Before I started business, they told me they would not make checks any other way. That settled it.

“Q. You know Mr. Culligan?

“A. Absolutely.

“Q. Do you see him here today?

“A. Yes, he is here.

“Q. Now, you have alleged in the affidavit here, Mr. Scardino, that you ceased doing work the latter part of January, 1942. Is that correct?

“A. That is right.

“Q. You obtained materials from the San Mateo Feed & Fuel Company up until the middle of February?

“A. I buy material until maybe two days, three days, before I quit.

“Q. You bought materials as late as February 12th from the San Mateo Feed & Fuel Company?

“A. Yes, I think that is the last I bought.

“Q. Then, you did not quit the latter part of January, did you?

“A. I didn't say January; I said February.

(Testimony of Joseph L. Scardino.)

“Q. The affidavit says January. Is that correct?”

“A. I told you it was the 10th to 15th.

“Q. I am not asking what you told me. I am asking if the affidavit you swore to as correct, was correct? [132]

“A. Maybe I didn’t read it. Maybe I overlooked that. When I quit business was in 1942, in February.

“Q. Now, this Bud Moore that you spoke of, you know Mr. DaMonte, don’t you? A. Yes.

“Q. Who is Mr. Damonte?”

“A. I think, if I am not mistaken, he is the fellow sitting there.

“Q. At that time he was credit manager for San Mateo Feed & Fuel Company?”

“A. That is right.

“Q. So far as bills were concerned, your dealings were with him? A. That is right.

“Mr. Hoffmann: That is all.

“A. But, Mr. Moore was coming down, because I did the business with him. He told me if I did not pay the money, he would be kicked out of the job.

“Q. You knew who the credit manager was, didn’t you? A. He used to come too.

“Mr. Margolis: Just a minute. I think that is argumentative.

“The Referee: He may answer.

“Mr. Hoffmann: Q. You knew Mr. Damonte?”

“A. Mr. Damonte used to come with Bud Moore a couple of times to collect the money.

(Testimony of Joseph L. Scardino.)

“Q. Do you know where Bud Moore is today?

“A. I don’t know. I know where he lives, but I don’t know if he is there.

“Q. You don’t happen to know that he is in the service? A. I don’t know.

“Mr. Mullin: Q. Mr. Scardino, you started doing work for Conway & Culligan in 1937, didn’t you?

“A. I could not remember exactly when he started the work. I did the work in San Mateo, when he was down in East San Mateo and I was doing work until——

“Q. You know he had a subdivision in San Mateo south of the highway?

“A. That is right. [133]

“Q. Known as Hayward Park?

“A. That is right.

“Q. When Conway & Culligan started developing that, you started doing the contracting work for him on plastering? A. Yes.

“Q. When they completed that subdivision, they went to another subdivision known as Elmwood?

“A. That is right.

“Q. That is on El Camino Real, in South San Mateo? A. Yes, sir.

“Q. You worked there, did plastering for them?

“A. Yes.

“Q. From there you went to the new subdivision in Burlingame, known as Burlingame——

“A. Village.

“Q. That is right. And you did work there?

(Testimony of Joseph L. Scardino.)

“A. That is right.

“Q. You did all the work there for them in those subdivisions, or at least, a great deal of plastering? A. Yes.

“Q. Is it not correct that when you first started to work for Conway & Culligan, Mr. Culligan told you your checks would be made payable to you and the material men?

“A. That is right; he told me that.

“Q. And that procedure was followed through these three subdivisions, up to the time you stopped working? A. That is right.

“Q. Did you object to that procedure?

“A. Not to him.

“Q. Nor to Mr. Culligan? A. No.

“Q. Did you object to anyone in the firm of Conway & Culligan?

“A. I don't understand that.

“Q. Did you object to anyone that had anything to do with Conway & Culligan?

“A. Anyone that have to do with this job?

“The Referee: Q. Did you tell any other member of the [134] firm?

“A. Conway & Culligan?

“Q. Yes, that you objected?

“A. No, I never objected to nothing.

“Mr. Mullin: Q. Then, it was perfectly agreeable to you that the checks from their jobs be made jointly to you and whoever the material man was?

“A. With Conway & Culligan, yes.

“Q. During that time you bought materials

(Testimony of Joseph L. Scardino.)

from San Mateo Feed & Fuel and H. E. Casey & Company? A. Yes.

“Q. When you got those checks, you took them into the office of either San Mateo Feed & Fuel Company or H. E. Casey & Company, depending on who your material man was?

“A. That is right.

“Q. At that time there would be an adjustment of your account, for what you owed them on the job of Conway & Culligan? A. That is right.

“Q. You followed that procedure through the three subdivisions? A. That is right.

“Redirect Examination

“Mr. Margolis: Q. Were you supposed to get any portion of the original payment on the particular job, directly to you?

“A. On those jobs, Conway & Culligan used to give me one check for maybe three jobs, sometimes maybe just one job; it all depends; sometimes once a month, twice a month, all the work, whenever the payments are due. Probably they make it on one check for two jobs or more, whatever payments were due.

“Q. Were any of those payments to go directly to you alone on these jobs? A. No, no.

“Q. For your profit, or your own work, weren't you supposed to get the first payment for yourself, or the second [135] payment?

“A. The first payment I would get on jobs to me to pay labor probably. If there was a little pro-

(Testimony of Joseph L. Scardino.)

fit over labor, I kept it. The second check, we agree, were material men, to pay the material.

“The Referee: Q. The second check?

“A. The second check.

“Mr. Margolis: Q. You did that in every instance?

“A. I did that with Conway & Culligan until I finished.

“Q. There were some jobs where you did not get that additional check made jointly by the general contractor to the material man and yourself?

“A. On Conway & Culligan?

“Q. Or any?

“A. Conway & Culligan made the first check and second check both was made joint.

“Q. Yes?

“A. When I got the first check, they have to endorse the check and give to me.

“Q. Did they do that, or send it to the material man?

“A. No, they gave to me, Conway & Culligan, and I bring it to the material man. I could not say, maybe a couple of times they did send it to the office, and they have to bring it to me to sign.

“Q. Did they give you any portion of those checks, or ask you to give them the whole check?

“A. San Mateo Feed & Fuel and Casey & Company wanted me to pay the labor. If there was any money left over, they used to give me a refund. If there was not enough, I go on to another job. If I had money in my pocket, I used to pay. But

(Testimony of Joseph L. Scardino.)

one time, Mr. Casey absolutely refused to sign the check.

“Q. Drawn payable to you?

“A. They always sent the check, and it was the first payment on the job, and I used up against it to pay my labor. And there was another fellow that was credit manager—— [136]

“Mr. Mullin: May we have the date, approximately, on this? When did this happen?

“A. This happened, I believe it was 1941; it was in the summer time. I cannot say the date when it was.

“Mr. Mullin: I move to strike it, Your Honor. It has no bearing on this particular issue, not being within the period.

“Re-cross Examination

“Mr. Mullin: Q. Mr. Scardino, in your type of business, you put on the first coat of plaster. That is known as the ‘brown coat’. Is that right?

“A. Yes.

“Q. At that time you get a check for a percentage of whatever your bid was?

“A. That is right.

“Q. What was it? Forty or fifty?

“A. Sixty per cent.

“Q. Sixty per cent on the brown coat?

“A. That is it.

“Q. That check came to you and from that check you paid your bills for the various mechanics you had on the job, your men, your labor claims?

“A. That is right.

(Testimony of Joseph L. Scardino.)

“Q. When you completed the job and gave it the final coat, the check was issued to you by Conway & Gulligan for the difference between the first check and the contract price?

“A. That is right.

“Q. And that check would be made payable jointly to you and San Mateo Feed & Fuel, or to you and H. E. Casey & Company, depending on who gave you the material? A. Yes.

“Q. Now, Conway & Culligan—each house built had a number, didn't it? A. That is right.

“Q. You kept your books; your bid on No. 87 would be so many dollars, for example?

“A. Yes.

“Q. In their books, each house had a number?

“A. Yes.

“Q. When you would bring this check into San Mateo Feed & Fuel or Casey & Company—when you bought your material from them, you told them this particular material was going to job 87 for example, to bill it to this job, or that job?

“A. It was right on the job. [137]

“Q. When you bought your material, you told them to deliver it to job 87 or 68, or whatever it happened to be? A. Yes.

“Q. They kept their books, had an account of how much material was supplied on job 87, job 46, whatever it was. When you brought in the final check to Casey & Company or San Mateo Feed & Fuel, they took out the amount due them for ma-

(Testimony of Joseph L. Scardino.)

terials for that particular job the check covered. Is that right? A. Yes.

“Q. And anything over, they gave to you, either in a check or in cash. Is that right? A. Yes.

“Q. Or, if you had enough money at that time, you would tell them to put it on another job, credit your account on something else. Is that right?

“A. Yes.

“Q. That procedure followed right along?

“A. Yes.

“Q. That followed until the time you quit work?

“A. Until I quit work.

“Redirect Examination

“Mr. Margolis: Q. You told us a minute ago, Mr. Scardino, that some of these first checks, Casey & Company refused to endorse? A. Yes.

“Mr. Mullin: May we have the time on that, Counsel?

“Mr. Margolis: I am going to lead up to it; this is just preliminary.

“Q. You have listed in your schedules, certain wage claims, certain people you owe money for wages. Is that correct?

“A. Well, it was the men working for me.

“Q. That is right. The workmen?

“A. Yes.

“Q. Now, can you tell us when Casey & Company refused to sign these first checks for your 40%, or whatever the percentage was? [138]

“A. It was in 1941. I would say around October, November, I could not say exactly.

(Testimony of Joseph L. Scardino.)

“Mr. Hoffman: It is all immaterial.

“Mr. Margolis: Just a minute. After I lead up to the non-payment of these wage claims, I will take him from that point to the month it occurred again.

“Mr. Hoffman: Wait a minute. If it was 1941, even if they practically extorted the money from him, it is immaterial.

“Mr. Margolis: December, 1941, Your Honor.

“Mr. Mullin: This was October or November.

“Mr. Margolis: Q. The refusal of Casey & Co. took place about October or November, 1941. Did you have a somewhat similar instance when you went to get a check?

“Mr. Hoffman: We further object on the ground that it is not binding on the San Mateo Feed & Fuel Company.

“The Witness: A. That time the credit manager was not there. They said they could not sign.

“The Referee: Q. When was that?

“A. Late 1941.

“Q. What do you mean by late 1941?

“A. Around November, October. The last of October or first of November.

“Mr. Mullin: I move to strike that, on behalf of H. E. Casey & Company.

“The Referee: It may go out, so far as October and November are concerned.

“Mr. Pardini: Wouldn't it be subject to showing what became of the check?

“The Referee: No, it would not be.

(Testimony of Joseph L. Scardino.)

“Mr. Pardini: That the check was not cashed? Apparently it was not collected until February, 1942.

“The Referee: Show that it was.

“Mr. Pardini: I don't know what counsel has in mind.

“The Referee: They are entitled to the objection, just the same. [139]

“Mr. Margolis: Q. Were there any of those instances that took place after December, 1941? Do you recall any instance of their refusal to turn over the first check to you in December, or January?

“The Witness: A. Mr. Casey was in the office himself one time. He says: ‘Joe, we got to have money; you got to make a payment.’

“Mr. Mullin: May we have the time of this?

“The Referee: Yes. When was it?

“A. January, two or three weeks before I quit. I said: ‘Mr. Casey, I ain't got money.’ I say: ‘As soon as I collect, all the money you get.’ The same with the San Mateo Feed & Fuel.

“Mr. Hoffman: Just a minute. Who did you see in the San Mateo Feed & Fuel Company?

“A. The credit manager.

“Q. Mr. Damonte?

“A. Mr. Damonte. I told him.

“Q. This testimony of yours, the checks were made jointly to yourself, that you are talking about, and Casey & Company. Does that apply to the San

(Testimony of Joseph L. Scardino.)

Mateo Feed & Fuel Company. Did they refuse to cash them?

“A. No, San Mateo Feed & Fuel did not refuse. They complained they had to have money. In other words, no more material. Mr. Moore used to tell me he used to come sometimes with Mr. Damonte, and say they got to have money; they cannot do business like that.

“Mr. Hoffman: I move to strike it as not responsive.

“Mr. Margolis: I think it was.

“Mr. Hoffman: The question was, if the San Mateo Feed & Fuel Company refused to cash the checks. Then he goes on rambling.

“The Referee: I think you are right. It may be stricken.

“Mr. Margolis: He said they made demands for other money, not made jointly. [140]

“The Referee: But, he did not say they refused about signing the checks. That was the question.

“Mr. Margolis: Q. Were any payments supposed to come to you to pay the laborers?

“The Witness: A. Yes.

“Q. Directed to San Mateo Feed & Fuel Company, or made payable to San Mateo Feed & Fuel Company and yourself, in the latter part of January or February?

“Mr. Hoffman: Just a minute, if Your Honor please, the question as stated, assumes a fact not in evidence. That is this: ‘Any payments supposed to be given you for the payment of laborers.’

(Testimony of Joseph L. Scardino.)

The man's testimony is that 60% was paid directly to him, with which he paid the laborers; the balance, 40% was made jointly, from which materials were to be paid.

“Mr. Mullin: I join in the same objection.

“The Referee: Read the question.

“(Question read)

“The Referee: What is the objection?

“Mr. Hoffman: That it assumes a fact not in evidence, the very general statement. The objection is this: The way the question is framed—‘Were any of the checks made payable to you, for which you were supposed to pay the laborers, were any payments made payable to San Mateo Feed & Fuel Company and yourself?’ The fact not in evidence, assumed in the question is: That any checks with which he was supposed to pay laborers were made jointly to anyone. The testimony already is definitely to the fact that with Conway & Culligan, at least, he received in his own name, not the joint names, 60% of the contract price and his testimony is that from the 60%, he paid the laborers.

“The Referee: I did not so understand him.

“Mr. Mullin: That is my understanding; that the first check was made payable directly to him and the final payment jointly. [141]

“The Referee: Let's find out.

“Mr. Margolis: Q. What was your statement?

“The Witness: A. As I said before, all the

(Testimony of Joseph L. Scardino.)

checks that came from Conway & Culligan, if it was for ten or one job, always were made jointly, from first to last.

“The Referee: What about the San Mateo Feed & Fuel Company?

“A. Well, the check came from Conway & Culligan.

“Q. You see, there are two accounts here?

“A. They used to make them the same way.

“Mr. Margolis: Q. To San Mateo Feed & Fuel?

“A. The same thing.

“The Referee: Q. All checks?

“A. All checks Conway & Culligan make to me or other subcontractors, they make like that. They used to operate business that way.

“Mr. Margolis: Q. Always you had to take those checks, you either took them yourself or mailed them, to San Mateo Feed & Fuel Company and H. E. Casey & Company? A. Yes.

“Q. Were you always able to get their endorsements of these so-called 60% that was mentioned here? Were you able to get them endorsed back to you, in other words?

“Mr. Mullin: To which we object unless the time is specified.

“The Referee: It must be subsequent to December 29th.

“Mr. Margolis: That is the time I am referring to, Your Honor.

“The Referee: I know, but that is not your question.

(Testimony of Joseph L. Scardino.)

“Mr. Hoffman: I think it would save confusion if you would designate San Mateo Feed & Fuel Company and H. E. Casey & Company separately.

“Mr. Margolis: He just stated they were handled the [142] same way, Counsel. At least one contractor, Conway & Culligan, made their checks payable jointly to himself and both San Mateo Feed & Fuel Company and H. E. Casey & Company.

“Mr. Hoffman: We have gotten some confusion here. But, originally, I think the witness testified that in October or November, Casey & Company refused to endorse a check. Counsel, then, was going to tie that in to a period within four months of the bankruptcy. I interposed an objection, whether or not the same thing applied to San Mateo Feed & Fuel Company, whether or not they ever refused to endorse a check, and we have gotten pretty far afield from that.

“Mr. Margolis: Q. Bearing in mind the four months' period prior to the filing of your petition in bankruptcy, do you have that in mind, Mr. Scardino?

“The Referee: Why not give him the date? December 29th, isn't it?

“Mr. Margolis: Q. December 29, 1941 is the commencement of the four months' period. You filed the petition and schedules on April 29, 1942.

“The Witness: A. Yes.

“Q. Now, at any time within that period, did you receive checks made payable from the general contractors, whether it was Conway & Culligan or

(Testimony of Joseph L. Scardino.)

any other general contractor, made payable to yourself and the two respondents here, different checks, payable to San Mateo Feed & Fuel Company and Joseph Scardino, or H. E. Casey & Company and Joseph Scardino? You received checks like that, did you?

“A. The last check I received from them was January 29th, under a week before a quit, the last week I quit, and I received no last payments; it was made joint. After that I did not receive no more money, because I signed the assignments to them and left them collect all accounts coming to me.

[143]

“Q. The last check received, what happened to that?

“A. I paid some of the labor. I owed three weeks wages. What I had, I gave to them.

“Q. Now, your schedules show you owed laborers some money at the time you filed the petition?

“A. Yes.

“Mr. Hoffman: That is not binding on the Respondents, if Your Honor please, that line of questioning. The question is whether or not they received a preference here. Naturally, he owed some bills or he would not be here, whether they are labor claims or anything else. I object to that line of questioning on the ground that it is irrelevant, incompetent and immaterial.

“Mr. Margolis: I am trying to lay the foundation without putting words in the witness's mouth.

“Mr. Mullin: In addition, Your Honor, I ob-

(Testimony of Joseph L. Scardino.)

ject to any transaction had with anyone else outside of Conway & Culligan. What he did with any other general contractor, we are not interested in.

“The Referee: He would have to show he had other creditors or it could not be a voidable preference if they did receive it.

“Mr. Hoffman: The schedules speak for that.

“The Referee: Are you willing to rest on the schedules? You are not objecting to them?

“Mr. Hoffman: The only thing I am objecting to on the schedule is, we were not named.

“Mr. Margolis: I think the answer made by the witness, made in the affidavit and during several hearings we had, I think the record will show his testimony in that regard. He believed, by virtue of these payments, whether you call them assignment, preference or what, the moneys they received from Conway & Culligan and other general contractors, he believed they were paid and so told his attorney. That is the reason you are not listed. That is the testimony. [144]

“The Referee: I know. That is not material. The only thing here is, first, the four months' period.

“Mr. Margolis: Yes.

“The Referee: Secondly, the fact that he has other creditors of the same class.

“Mr. Margolis: That is true.

“The Referee: All right. And that they received payments, knowing or having reason to believe that it would give them a preference over the other creditors.

(Testimony of Joseph L. Scardino.)

“Mr. Margolis: Mr. Hoffman, Your Honor, stated a moment ago that his client is not named in the schedule.

“Mr. Hoffman: I was kidding.

“Mr. Margolis: Maybe I misunderstood. You asked a question, whether they had an objection to the schedules. We offered them before; Your Honor said it was not necessary.

“The Referee: They are before the Court. The only thing I want to know, at the time you claim this payment was made, that he owed other people, at that time.

“Mr. Mullin: And that these Respondents knew he owed other people on other jobs.

“The Referee: No, they would not have to know that.

“Mr. Mullin: You are leading up to insolvency.

“The Referee: He has already testified to that, so far as the record is concerned, at the present time.

“Mr. Hoffman: I think, Your Honor, we should narrow the issues here. We have had a complete hearing here regarding the question of insolvency, knowledge, and so forth. Now, subsequent to that hearing, a petition was filed and there were four points enumerated upon which counsel wanted to introduce new evidence. I rather assumed, in that it was enumerated there, that this hearing would be confined to the four issues. In support of that, he filed an affidavit here by Mr. Scardino. I don't see any reason for having a complete rehearing, as long as he has enumerated the issues himself. [145]

(Testimony of Joseph L. Scardino.)

Now, the issues enumerated by counsel are:

“1. That within four months of the filing of Bankrupt’s petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt’s property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.

“He asked him that and the witness said it was not.

“2. That Respondents actually knew Bankrupt’s financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also thereafter up to and including April 29, 1942.

“He says in the affidavit it was the fact. We cross examined him as to whether or not it was the fact and he was mistaken; it was closed about the middle of February.

“3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received said payments.

“4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said pay-

(Testimony of Joseph L. Scardino.)

ments, Respondents knew they were obtaining preferences.

“Those are the matters on which we brought our proof today. I think we are entitled to have the evidence confined to those issues.

“The Referee: I think you are.

“Mr. Margolis: That is correct, but these gentlemen have taken the witness on cross examination. As I look at it, my redirect now is somewhat in answer to their cross. That is what led to this far afield condition. [146]

“The Referee: Does it help us any? Haven’t we certain facts to prove?

“Mr. Margolis: We will offer the affidavit in evidence, Your Honor, and let it go at that. I think the schedules are before the Court and show the creditors. I think Your Honor asked the question, whether the debts pending at that time—I will ask him the question if it will help the situation:

“Q. The claims you set forth, the unsecured:

“State Compensation Ins. Fund; Industrial Indemnity Co., two items here; Blake-Moffit-Towne Paper Co.; Markus Cut-Rate Hardware; Frank Peri and Sequoia Grocery Market, totalling the sum of \$1,858.22, were those owing on or about December 29, 1941? You owed those people at that time? A. Yes.

“Q. On one claim, \$74.80, of Industrial Indemnity Co., I notice you have the date, 11/6 to 12/6-41? A. Yes.

“Q. Then the other claim of the Industrial In-

(Testimony of Joseph L. Scardino.)

demnity Co. which goes from 12/6/41 to 1/6/42 is in the amount of \$59? A. Yes.

“Q. Those other claims, State Compensation Ins. Fund \$344.30, Blake-Moffit-Towne Paper Co., \$74.00, Markus Cut-Rate Hardware, Oakland, \$331.00, Frank Peri \$900.00, Sequoia Grocery Market, Redwood City \$75.00. Did you owe those bills on or about December 29, 1941? A. Yes, sir.

“Q. Did you owe these laborers approximately the amounts set out under Schedule A (1):

“Clarence G. Deals, \$47; T. Purcelli, \$55.50; H. Carlson, \$63; H. Hampton, \$51; Don O’Leary \$98; George Leith \$63; T. Cacano \$111; Joe Reginato \$111; Joe Chiri \$120; T. Spoon \$51. Did you owe those amounts at or about December 29, 1941?

“A. Yes, I did. [147]

“Q. Did you pay these creditors whom I have enumerated?

“A. No, I did not have much money. I used to keep that money. I still owe that money since that time, their quitting time, because I did not have enough, so I carry it, see, when I cannot pay any more.

“Q. In other words, you paid a little on the current work? A. Yes.

“Q. But not on the past? A. Yes.

“Mr. Mullin: Have you finished, counsel? I have not completed.

“Mr. Margolis: Go right ahead.

“Re-Cross Examination

“Mr. Mullin: Q. Mr. Scardino, you said Mr.

(Testimony of Joseph L. Scardino.)

Casey refused to endorse checks. Was it Mr. Casey, or the credit manager, Mr. Mindnich?

“A. I went there and Mendich first told me he cannot endorse the check; he is only the credit manager.

“Q. Did you go to see Mr. Casey?

“A. I go to see Mr. Casey.

“Q. How many times did that happen, Joe?

“A. Twice.

“Q. When did it happen?

“A. Just a short while ago. I cannot remember the time. Maybe three months before; one a couple of months after. But, finally, I had to phone later for it.

“Q. Just a minute.

“Mr. Margolis: Let him make the explanation.

“A. I had to phone later to have the check signed.

“Mr. Mullin: Q. There were two occasions, you say?

“A. Yes.

“Q. Were those the two occasions referred to in your previous answer as October and November, 1941? A. Yes.

“Q. Those were the same occasions?

“A. Was one around October and one a long time before.

“Q. And the other was October, 1941. Is that right? [148] A. Yes.

“Q. Now, Joe, you said the credit man came to see you about collecting some of these bills?

(Testimony of Joseph L. Scardino.)

“A. That is right.

“Q. You told him as soon as you collected, you will pay. Is that right? A. That is right.

“Q. What were you referring to, as soon as you collected? Collected what?

“A. From the general contractor, the second payments.

“Q. And that was whom; who was the general contractor?

“A. Well, I had a dozen, a dozen and a half. I could not say which.

“Q. Pardon me?

“A. Well, there was Schmidt. In fact, he check up with Schmidt, how much he owed me.

“Mr. Pardini: Q. By ‘he’, you mean the credit manager?

“A. Yes, the credit manager came down and went to the general contractor, how much he owed.

“Mr. Mullin: Q. How many general contractors are you talking of this time?

“A. I would say about twelve.

“Q. Who were they?

“A. I think the attorney has a record. Conway & Culligan was one; Gus Johnson is two; Stanley Younger; Schmidt; Donald Johnson. There is a lot I cannot remember. Some general contractors I cannot remember. I had about a dozen.

“Q. And at this time you had money due from all those people to you for all those various jobs you were working on? A. That is right.

“Q. So, when you told them: ‘As soon as I can

(Testimony of Joseph L. Scardino.)

collect, I will pay you', you had in mind that you had funds coming from the dozen general contractors? A. That is right.

“Q. And, at that time, would the amount of money you had coming from this dozen general contractors be enough to pay what you owed for materials to these creditors?

“A. I don't know. [149]

“Mr. Pardini: What time are you referring to?

“Mr. Mullin: I am referring to the same time he is referring to.

“Mr. Pardini: Well, I don't know.

“The Witness: A. I don't know.

“Mr. Mullin: Q. You had money coming from these people?

“A. I had money coming from the second payment, which we counted that the second payment would be enough to pay the materials.

“Q. Ordinarily, Joe, 40%, or the second payment, would be enough to pay the material bills and give you some for your profit for the job, wouldn't it? A. Maybe; maybe not.

“Mr. Pardini: Just a minute. That calls for speculation.

“The Witness: Maybe; maybe not.

“Mr. Mullin: I said, ordinarily.

“The Referee: He has answered your question.

“The Witness: Well, ordinarily.

“Mr. Pardini: I submit the question has been asked and answered.

“Mr. Mullin: Q. I will ask this: Which would

(Testimony of Joseph L. Scardino.)

it be? Would it be 'maybe' more times than 'maybe not'?

"Mr. Margolis: Just a minute. I object to the question on the ground that it has been asked and answered.

"Mr. Mullin: If you will show me where it was asked and answered——

"Mr. Pardini: I make the objection that it is speculative and it does not fix the time. I can answer you: Apparently it did not.

"Mr. Mullin: Who is testifying, you or your client?

"Mr. Margolis: The objection is before the Court.

"Mr. Pardini: The objection is that it is speculative and does not fix the time and place when 'maybe' and 'maybe not'. [150]

"The Referee: Can't a man, on cross examination, be asked for his conclusion?

"Mr. Pardini: Maybe he can. It is already asked and answered any way.

"The Referee: Not this question.

"Mr. Margolis: I object on the ground that it has been asked and answered.

"The Referee: Not this question; there is no answer.

"Mr. Mullin: Q. Do you remember the question?

"The Witness: A. You asked me if the 40% wasn't enough to pay the material.

"Q. The first question I asked you was if ordinarily it exceeded that. Your answer was, maybe;

(Testimony of Joseph L. Scardino.)

maybe not. A. That is right.

“Q. And I asked you which would prevail; would it be more maybes or more maybe not?”

“A. Maybe not.”

“Q. Now, Joe, where are you working now?”

“A. In the city here.

“Q. For whom? A. Myself.

“Q. Now, when you closed down your business, about February, 1942—that is when you closed, is it not? A. That is right.

“Q. You have in your affidavit that it was a month earlier, but it was February, wasn't it?”

“A. Yes.

“Q. Where did you go to work?”

“A. The Southern Pacific Shop.

“Q. At that time there were some unfinished jobs? A. That is right.

“Q. And is it not the fact that you told Mr. Thomas Culligan of Conway & Culligan you were giving up the plastering business, because you could make more money working for the S. P. Company?”

“A. No.

“Q. You did not tell him that? [151]

“A. I told him I cannot operate my business no more; I am broke; I quit. After about two weeks he wrote me a letter concerning he wants to finish those jobs.

“Q. Have you the letter now?”

“A. No. I went in the office.

“Q. He did not write you a letter, then?”

“A. Conway & Culligan wrote me a letter with

(Testimony of Joseph L. Scardino.)

the fact, if I would give clearance so he could get somebody else to finish the job.

“Q. Have you that letter now?

“A. I have not; no.

“Q. Do you know where it is? A. No.

“Q. Is that one of the things the dog got away with?

“A. That is right. So, I went to the office and told Mr. Conway and Culligan to get somebody to finish.

“Redirect Examination

“Mr. Pardini: Q. In November or December, 1941, the State of California sued and attached your money in the San Mateo branch of the Bank of America?

“Mr. Mullin: Let’s get the date within the four months period.

“Mr. Hoffman: It is immaterial anyway.

“Mr. Pardini: I will ask you: On December 29, 1941, was a small amount in the San Mateo branch of the Bank of America attached by the State of California?

“Mr. Hoffman: I still object to it as immaterial.

“The Referee: It is immaterial.

“Mr. Pardini: I don’t know whether the man knew about it.

“The Referee: Suppose he did know there was an attachment or there wasn’t an attachment?

“Mr. Pardini: If a man cannot satisfy an attachment for \$50—

“Mr. Mullin: Wait a minute. It is an attachment. If [152] it please the Court, still in this country, we are entitled to a trial.

(Testimony of Joseph L. Scardino.)

“Mr. Hoffman: It is not binding; not within the issues.

“The Referee: I think the objection is good.

“Mr. Pardini: Q. I might ask the same question: On April 20, 1942, was there money executed upon by the sheriff of the County of San Mateo, standing in a bank account in your name at the San Mateo branch of the Bank of America?

“Mr. Mullin: To which we object on the ground that it is incompetent, irrelevant and immaterial, not within the issues, and not binding on these Respondents.

“The Referee: What does that go to prove?

“Mr. Pardini: During all this time, here is an attachment unsatisfied.

“Mr. Mullin: So what?

“Mr. Margolis: I think counsel has in mind that it is set out by affiant in the affidavit that the only property he had was \$50 at the time he filed, which was subject to attachment.

“The Referee: That is not disputed. But, anything so far as the affidavit stands.

“Mr. Pardini: The objection is sustained to both those?

“The Referee: Yes.

“Mr. Pardini: Q. The change in the method of collecting the money occurred in January or February of 1942?

“Mr. Mullin: What are you referring to?

“Mr. Pardini: Q. In the case of both creditors, both Casey and the San Mateo Feed & Fuel, these

(Testimony of Joseph L. Scardino.)

papers you signed, you never had signed papers like that before, had you?

“Mr. Hoffman: Just a minute, please. Mr. Scardino, as Your Honor has probably observed, will answer yes to anything. The question is leading, suggestive, assuming a fact, stating a fact directly contrary to his testimony here. [153]

“The Referee: He just testified now, on cross examination by Mr. Mullin, that all this happened back in 1941.

“Mr. Pardini: I am not referring to that at all, if the Court please. I am referring to the acts in January and February and within the four months’ period.

“Mr. Hoffman: What acts?

“Mr. Pardini: This man not signing the joint checks, I am not concerned with that at all. As I understand, there were other matters signed, which he mentioned on direct or cross examination. They came up and got some papers to be presented to the contractors, these two Respondents.

“The Referee: That was after he had gone out of business, as I understood. They got a release so they could get somebody else to do the work.

“Mr. Pardini: No, something else before that. That is regarding the letter asking him to come to the office and give a release so somebody could complete the job.

“The Referee: Yes.

“Mr. Pardini: But, moneys were collected between December 29 and April 29, substantial sums,

(Testimony of Joseph L. Scardino.)

shown by the accounts introduced in evidence, and those collection, I believe it is intimated in the testimony now, were collected pursuant to another document. The payment made from Conway & Culligan was the custom of the trade, apparently; they did that with each sub-contractor, to protect the material men. There was a subsequent execution of something else, within the four months' period, in favor of these two Respondents.

“The Referee: Will you point it out in the evidence? I remember the other testimony that was given here, which, of course, I will have to keep in mind, but I did not hear him testify to that today.

“Mr. Pardini: I think I can remember it.

“The Referee: Now? On the examination of him? [154]

“Mr. Pardini: On the examination, I think, of Judge Mullin.

“Mr. Hoffman: What he testified to was, after he went through bankruptcy, Conway & Culligan wrote him a letter.

“Mr. Pardini: He testified as to a certain assignment. He used that word.

“The Referee: Let's not argue about it. Let the reporter go back to Judge Mullin's examination and see if she can find it.

“(Question and answer read as follows:

Cross Examination: Mr. Hoffman: Q. Mr. Scardino, you say that between December and April the San Mateo Feed & Fuel Company

(Testimony of Joseph L. Scardino.)

and the Casey Company asked you to make checks payable jointly to themselves? That is, that your debtor make checks payable to San Mateo Feed & Fuel Company and yourself?

A. I signed an assignment, according to the last time the check was made to them.)

“The Referee: That was in response to Mr. Hoffman.

“Mr. Pardini: Counsel for the trustee now states that was already gone into on the previous hearing and there is testimony in the record.

“The Referee: Very well.

“Mr. Pardini: I understand that all the previous testimony in the matter is before the Court?

“The Referee: Yes. This is a further hearing, not a new hearing.

“Mr. Margolis: If the questions of Mr. Pardini, the attorney for the bankrupt, are going to clarify it, I will not interpose an objection. I merely point that out.

“The Referee: I say, if he wants to go into it at this [155] time, it is part of redirect. Mr. Hoffman brought it out.

“Mr. Pardini: Q. In other words, there was a change by one of the creditors that had been receiving joint checks. From then on, they got straight checks after the assignment in evidence was executed by you and sent to the contractor?

“The Witness: A. That is right.

“Mr. Hoffman: You are referring to Trustee’s ‘A’ for Identification?

(Testimony of Joseph L. Scardino.)

“Mr. Pardini: Yes. One is Trustee’s ‘A’ for Identification and also Trustee’s Exhibit No. 1 in evidence. That refers to San Mateo Feed & Fuel Company, and H. E. Casey & Company, and Frank Peri.

“Q. That is what you are referring to, isn’t it?

“Mr. Hoffman: I object to that question.

“The Witness: A. At the time I quit, I didn’t have anything to collect. After, that bill was coming to me.

“Mr. Margolis: Q. The claim of Frank Peri was for labor, was it?

“A. Labor.

“Q. He was not paid in full, was he?

“A. No.

“Mr. Mullin: Who?

“Mr. Margolis: Peri.

“That is all.

“(Witness excused).

“The Referee: Do you desire any further testimony?

“Mr. Margolis: That is all, Your Honor. The Trustee rests.

“Trustee rests.

“(Recess).

“The Referee: Call your next witness.

"THOMAS J. CULLIGAN, JR.

"Called for Respondents, sworn.

"Mr. Mullin: Q. What is your address, Mr. Culligan?

"A. Home, 1549 Nadina. [156]

"Q. That is San Mateo. Is that correct?

"A. San Mateo.

"Q. You are one of the owners of the firm of Conway & Culligan?

"A. It is a partnership.

"Q. You know the bankrupt here, Joseph Scardino? A. Yes.

"Mr. Mullin: This is preliminary, Judge.

"Q. He worked for you in 1937, doing plastering? A. Doing plastering.

"Q. Doing plastering work in Hayward Park, Elmwood and also Burlingame Village?

"A. Yes.

"Q. And in the payment to Mr. Scardino, there was a first and second payment. I believe the procedure was, after the brown coat, the payment was 60%? A. Sixty per cent.

"Q. Will you tell us whether or not checks for the first payment were made directly to Mr. Scardino or to Mr. Scardino and anyone else?

"A. The first payments were made to Mr. Scardino alone.

"Q. On all occasions?

"A. On all occasions.

"Q. The second payment?

"A. Made to Scardino and the material house where he bought the material.

(Testimony of Thomas J. Culligan, Jr.)

“Q. Dependent on whether it was Casey & Company or San Mateo Feed & Fuel Company?”

“A. He would notify us.

“Q. That was followed from 1937 to the time he stopped work?”

“A. That ran from the time he took the original contract.

“Q. Now, Mr. Scardino was acting for you as a sub-contractor in the early part of 1942?”

“A. Yes.

“Q. In Burlingame Village?”

“A. That is correct.

“Q. You had a number of jobs going on there; you were developing the entire tract?”

“A. That is right.

“Q. Each house had a number? That is the system under which you operated?”

“A. That is right.

“Q. He was operating there as your sub-contractor? A. That is right. [157]

“Q. Did Mr. Scardino at any time during January or February, 1942, fail to appear on the jobs as had been his custom previously, in the management and also the workmanship around the jobs?”

“A. I never noticed any difference. Of course, he was doing jobs for other contractors. There would be days, weeks probably, I didn't see him.

“Q. Did he stop working for you?”

“A. He stopped working for me?”

“Q. Did he stop working for you?”

“A. Yes, he stopped working.

“Q. About when, Mr. Culligan?”

(Testimony of Thomas J. Culligan, Jr.)

“A. I think it was—if I recall, it was the latter part of February.

“Q. 1942? A. 1942.

“Q. Were there any mechanics left on the jobs?

“A. Yes, I think there were about five or six men working for him at that time.

“Q. I show you here, Mr. Culligan, Trustee’s Exhibit No. 1; a letter purporting to be on your stationery, dated February 20, 1942, addressed to Conway & Culligan, reading:

“ ‘You are hereby authorized to pay from any amounts due me for work on your jobs the monies or any part thereof due the following business firms:

San Mateo Feed & Fuel Co.

Frank Perry

H. E. Casey Co.

and all labor bills, and charge same to my account.

‘In consideration of your paying whatever monies is due me on the above accounts, I shall expect you to hold me harmless provided the statement I have rendered you is correct.

(Signed) ‘J. L. SCARDINO.

‘Accepted:

‘T. J. CULLIGAN, JR.

‘Witness:

‘J. C. MINDNICH.’ [158]

(Testimony of Thomas J. Culligan, Jr.)

“A. That is right.

“Q. That is your signature there, T. J. Culligan, Jr.?
A. It is.

“Q. That was signed by Mr. Scardino, was it?

“A. Yes.

“Q. On the date it bears?

“A. That is right.

“Q. Will you advise us as to the circumstances under which that was executed, please?

“A. Well, at this time, he told me he was going to quit business. He felt he should go into some sort of defense work, though primarily, he mentioned at that time the shipyards, but I understand he went into the Southern Pacific.

“Mr. Margolis: I object to what his understanding was.

“Mr. Mullin: It may go out.

“Mr. Margolis: He can merely testify as to the parties present, when it was.

“Mr. Mullin: It is already stipulated it may go out.

“Q. Now, what did he tell you, Mr. Culligan? Not what you thought; the conversation as you remember it?

“A. He told me he was going out of business.

“Q. And what, if anything, happened after that as between you and Mr. Scardino?

“A. What happened after that?

“Q. Yes? A. After this was signed?

“Q. After he told you he was going out of business. What if anything did you do?

(Testimony of Thomas J. Culligan, Jr.)

“A. Well, I got another contractor.

“Q. I see. To finish the work?

“A. In other words, maybe there were ten homes up there to the first coat of plaster; maybe some whitewashing to do, and so forth, which I had another contractor come and take over his contract.

“Q. Who prepared the instrument you hold in your hand, Trustee’s Exhibit No. 1?

“A. I believe I did. [159]

“Q. Do you remember where that was executed, Mr. Culligan?

“A. If I recall, it was executed in Mr. Scardino’s own home. I am not quite clear on that.

“Q. And did Mr. Scardino tell you why he was going out of business?

A. He said he could make more money working in defense work.

“Q. And at that time, February 20th of 1942, did your firm owe any money to Scardino?

“A. Yes.

“Q. For work which had been performed or in process of being completed?

“A. Yes, I think the final accounting at that time amounted to approximately \$2000 balance due him on brown coat payments, or any balances of jobs that were completed.

“Q. You secured another contractor to complete the jobs?

“A. We secured another contractor to complete the jobs.

“Mr. Mullin: You may cross examine.

(Testimony of Thomas J. Culligan, Jr.)

“Cross Examination

“Mr. Margolis: Q. Who was present in Mr. Scardino’s home when this was executed?

“A. If this was executed at his home, Mr. Mindnich. I remember the two of us drove to his home. I believe it was this document.

“Q. You are not positive?

“A. He signed some document, as I remember, at Joe’s home.

“Q. Who is Mr. Mindnich?

“A. Mr. Mindnich was credit manager for H. E. Casey Co.

“Q. Who arranged for this, Mr. Scardino or Mr. Mindnich?

“A. I did. In other words, this was protection. If he was going out of business, I had to have a plasterer.

“Q. It was prepared after he told you he was going out of business?

“A. After he told me he was going out of business.

“Q. It was not prepared when Mr. Mindnich came to you and endeavored to ascertain how much your firm owed Scardino?

“A. No, this was done after. [160]

“Q. It was all done the same day?

“A. Yes, I think it was.

“Q. The conversation had with Mr. Scardino?

“A. That is right. We had spent two or three days trying to get in touch with Joe and could not quite contact him. We went down one afternoon,

(Testimony of Thomas J. Culligan, Jr.)

he happened to get home and explained the condition of this and said that was the best thing to do.

“Q. That day he told you he was going into defense work?

“A. That day he told me he was going into defense work, going to quit business.

“Q. What time of day or night?

“A. It was in the afternoon, as I recall, 2:30 or 3. We drove down after lunch.

“Q. That was prepared, you say, after he told you? A. Yes.

“Q. How many times did you see him that day, Mr. Culligan?

“A. I think it was twice.

“Q. In what other place did you see him?

“A. At the home. We drove to his home. He said he would wait for us until we prepared the document. We went down and came back, as I recall.

“Q. You did not take him to your office?

“A. No.

“Q. How far from your place of business?

“A. He lived at Redwood City. Our place of business was Burlingame, probably fifteen miles, I guess, about twenty minutes' drive.

“Q. Was any such document or similar document prepared with respect to any other money you owed him?

“A. This involved all the moneys.

“Q. That involved all?

“A. That is right.

(Testimony of Thomas J. Culligan, Jr.)

“Q. No other document was prepared, any document whatsoever?

“A. None that I recall. I think this was all.

[161]

“Q. You are quite positive about that?

“A. As to any other document?

“Q. Yes?

“A. If there was any other document, it was relative to this; it was the same thing. As I recall, this was the only document.

“Q. What is the date of that?

“A. That is February 20, 1942.

“Q. And the entire transaction was consummated on that date. Is that correct?

“A. Yes, as I recall, it was only that day I saw Joe. I don't recall seeing him any other time.

“Q. I show you Trustee's Exhibit 'A' for identification? A. Yes. That is right.

“Q. Have you seen any document like that, similar to it, or the original of the document you hold in your hand? A. No, I have not.

“Q. That is addressed to your firm?

“A. Yes, I see that it is.

“Q. To your attention?

“A. That is right. It may be that I have the original, but I don't recall it, in my file.

“Q. Do you recognize the handwriting of the figures there at all, Mr. Culligan?

“A. No, I don't. As being mine, you mean?

“Q. Whoever it is? A. No, I don't.

“Q. What is the date of the document?

(Testimony of Thomas J. Culligan, Jr.)

“A. February 18th.

“Q. Two days before this other document?

“A. Yes, this one here is the 20th.

“Q. You testified a minute ago that you paid him at once, or in due course, the 60% of the contract price on each of these jobs?

“A. Each job number. That would go automatically to him, the first payment, because the first payment involves the [162] lathing. He does the lathing. Other than his direct payroll, he probably subs that out. The first check would be direct to Scardino; the other 40% would be to Scardino and the other material men.

“Q. You kept a file on this job?

“A. We kept a complete file.

“Q. Have you the file with you? A. No.

“Q. Those are your job numbers on that?

“A. Those are job numbers. That is the way our jobs are always run.

“Q. Who else would have access to your file for the numbers of the jobs set out in Exhibit ‘A’?

“A. Probably the material house would know. I would know it.

“Q. Would Scardino know it, do you know?

“A. Let’s see. Yes, he would be bound to know it. If he ordered three barrels, he would know.

“Q. You don’t know if that document ever reached your files, or your hands?

“A. No, I don’t remember now. It must be. It is written to me, but I don’t remember it.

(Testimony of Thomas J. Culligan, Jr.)

“Q. When did you last examine your file on the Scardino work before coming here this afternoon, Mr. Culligan?

“A. Oh, it was, I think, six or seven months ago. Somebody phoned me in San Francisco relative to this. I don't know if it was you; somebody asked us to give some information. That is the last time I looked at it.

“Q. The information is in your office down the Peninsula, not here. Is that correct?

“A. Yes, that is correct.

“Q. And you tell us now, you know the 60% was paid on each and every job?

“A. The first payment?

“Q. The first payment?

“A. Yes. That procedure went on day after day 60% of the total contract.

“Q. Do you know why that document was necessary? [163]

“A. Well, I suppose probably it was giving an accounting of how the jobs stood at this time. In other words, if he was going out of business, I would have to have a statement of how he stood with Casey Company, or what-not, so the amounts I owed Joe would correspond with the amounts he owed the material house.

“Q. Did you get a similar break-down from the San Mateo Feed & Fuel Company?

“A. As I recall, I did not need one from them. Theirs was a bulk amount. He bought the wash paint from them, like stuff that goes over the plast-

(Testimony of Thomas J. Culligan, Jr.)

er. That would not necessitate 'Job so-and-so'. He would buy that by the sack.

"Q. Did Scardino at any time between December, 1941 and April, 1942 endeavor to collect moneys directly from you? A. No.

"Q. He did not? A. No.

"Q. He never asked you for any moneys at all?

"A. No. That is what surprised me so much about the whole thing. In all fairness to Joe, he could have come to me at any time and said: 'You owe me \$2,000; I need \$500 for so-and-so'. I wouldn't question him.

"Q. You did not question his financial condition?

"A. I never did. Just to show you: That last week, when he owed labor claims there, I didn't even know he was going out until the last week he went out.

"Q. What week do you refer to?

"A. The last week he was in business; this week of the 20th here. I don't think he paid his men's salaries. I had no idea at that time, even then.

"Q. You believed he had the money to pay it, Mr. Culligan?

"A. Sure. I had always found him very up and up on his dealings.

"Q. You believed he had the money to pay?

[164]

"A. Yes. I was the most surprised man in the world.

"Q. You had no way of ascertaining he did not

(Testimony of Thomas J. Culligan, Jr.)

have the money to pay the laborers? A. No.

“Q. Did you endeavor to ascertain why he did not pay them? A. No.

“Mr. Margolis: That is all.

“Redirect Examination

“Mr. Mullin: Q. Did Mr. Scardino ever tell you he was broke? A. No.

“Q. Or could not pay his bills, that he was insolvent or contemplated filing a petition in bankruptcy? A. No.

“Q. The answer to all that is no? A. Yes.

“Mr. Mullin: That is all, sir.

“Re-cross Examination

“Mr. Pardini: Q. You made two trips to his home that day. Was Mindnich with you on both occasions? A. Yes.

“Q. I think you fixed the time of one trip as what approximate time?

“A. Right after lunch; around 2 or 2:30.

“Q. Both trips?

“A. Right in the afternoon, correct. The whole thing was wound up that day, because Joe had to go to work.

“Q. Those numbers mentioned in Trustee's Exhibit 'A', while you have never seen it, you identify as being job numbers?

“A. Yes, those are correct.

“Q. Were the moneys subsequently paid by you?

“A. Correct.

(Testimony of Thomas J. Culligan, Jr.)

“Q. They were paid substantially as indicated in Trustee’s Exhibit ‘A’? A. That is correct.

“Q. And, when you went down to Scardino’s home in Redwood City on February 20, 1942, how long had it been since Scardino had been on the job? [165]

“A. Oh, I guess it had been probably a week previous, maybe five days previous, since I had seen him. Now, that wasn’t out of the ordinary. He had a foreman on the job. It was not out of the ordinary. I might not see him for a week or two weeks.

“Q. But, you already knew he was not going on with the work?

“A. No, I did not know it up until the last minute.

“Q. On the 20th?

“A. Well, probably that time, yes.

“Q. How did you happen to find that out? What was the first notice you had?

“A. The first notice I had was, Mindnich, the credit manager got me on the phone and said he understood Joe Scardino was not going to do our work. I said: ‘Funny that doesn’t come from Joe. I have fifteen buildings here ready to be plastered.’ Some even had the lath work done. I said: ‘We better go see Joe.’

“Q. What was the date of that?

“A. I could not tell you.

“Q. Was that the 20th, the day of the letter?

“A. I could not tell you. This was on the phone.

“Q. Mindnich was your employee, was he not?

(Testimony of Thomas J. Culligan, Jr.)

“A. No, he was credit manager for Casey Company.

“Q. How long before?

“A. It was all within a period of two or three days, because I said: ‘We better bring it to a head right away.’

“Mr. Pardini: That is all.

“Mr. Margolis: Q. You did not question Scardino on the two trips you made to his home that day about these labor claims or other creditors?

“A. Not at that time, no. At that time I did not know there was any labor claims. The labor claims did not come in for a week or two weeks after, from the Labor Commissioner. [166]

“Q. You know H. E. Casey Company, don’t you? A. Oh, yes.

“Q. You know the San Mateo Feed & Fuel Company? A. Correct.

“Q. Do you know Frank Peri?

“A. Yes. Frank Peri done his lathing. He has done it since 1937, when Joe first started.

“Q. Does Frank Peri have men assisting him in the lathing? A. Yes.

“Mr. Mullin: That is objected to as immaterial, incompetent, and irrelevant.

“Mr. Margolis: Certainly, it is. The name Frank Peri appears.

“Mr. Mullin: Frank Peri is not at issue here.

“The Referee: What is your point? What did Frank Peri have to do with the subject matter of this particular hearing?

(Testimony of Thomas J. Culligan, Jr.)

“Mr. Margolis: Well, to show the connection between this general contractor and these Respondents, Your Honor. He claims he did not know of Scardino’s condition at all until much later. Here, then, in his own office, on his own stationery, is a letter which purports to direct him to make certain payments to certain people. Frank Peri, as we learn from the bankrupt, had wage claims, labor claims, and the name is very plainly set forth in the letter.

“The Referee: This letter?

“Mr. Margolis: Yes. And the witness testified he knew of no labor claims whatsoever.

“The Witness: Peri would have no occasion to come to me with a thing like that. I don’t know Peri exists. He subs that out.

“Q. I did not ask you whether Peri came to you. I asked if you knew whether there were any labor claims and [167] if you knew Frank Peri?

“A. All the wage claims I have is direct with Joe. I found that out two or three weeks after this, when I got the letter from the Labor Commissioner, that the last few jobs in Burlingame Village, the labor was not paid.

“Q. You did not question him at all about the contents of that letter?

“A. What letter are you referring to?

“Q. The letter I am referring to, right there?

“A. Question who?

“Q. Scardino, when you asked him to sign. You had no conversation with him?

(Testimony of Thomas J. Culligan, Jr.)

“A. No. I told him we wanted this thing. He said he was going out of business. I said, in light of that, then, the thing to do is to make an adjustment settlement; that is the only way to do it. The only people involved at that time, there were only three people involved in our work. The material houses were the only ones involved.

“Q. You did not discuss what made up the Peri claim at all? A. No.

“Q. Did you have any record as to what portion to pay Peri? A. No.

“Q. How would you know from the letter?

“A. I finally got one after this. I sent to Peri, San Mateo Feed & Fuel, whoever they are, and got a statement for myself.

“Q. You did not have a statement before that was prepared? A. Of Peri? No.

“Q. San Mateo Feed & Fuel? A. No.

“Q. Of Casey Company?

“A. I think the day I talked with Mindich over the phone, which was two or three days before we contacted Joe. I think I talked to Mindich, because Casey Company, their [168] bill was the major one. I said: ‘You better draw a statement, so when we see Joe, we will know what we are doing.’

“Q. Those statements are all available? .

“A. Yes.

“Q. And the files?

“A. Oh, yes. Our checks are available from 1937.

(Testimony of Thomas J. Culligan, Jr.)

“Mr. Margolis: I think they ought to be produced.

“Mr. Mullin: I don’t see what materiality they have, if Your Honor please. It seems to me there must be a stop somewhere on this fishing expedition. Mr. Culligan is not on trial here. He has come in and testified how the exhibit was obtained, which is directly contrary to the testimony on behalf of the trustee. What Peri has to do with this, is not material.

“The Referee: How is it material?

“Mr. Margolis: Both Respondents are named.

“The Referee: What is the materiality of that?

“Mr. Margolis: I want to tie in that letter with the prior letter of the 18th, which the witness says he knows absolutely nothing about.

“The Referee: How can you tie that in? He says he does not know about that.

“Mr. Pardini: He says it may be in his file.

“The Referee: That is what I say. It would not connect anything up if you got it in. Suppose he has it in his file?

“Mr. Pardini: He stated he made these payments.

“The Referee: He did not say when he made the payments. What difference would it make? I don’t see the materiality of it myself. Maybe I am mistaken, but I cannot follow you there. The question is whether this man knew that he was insolvent, or had reason to believe he was insolvent.

(Testimony of Thomas J. Culligan, Jr.)

“Mr. Margolis: He is not a creditor, Your Honor; he is a debtor.

“The Referee: That is all the more reason that it does not help you, [169]

“Mr. Margolis: It would help in this respect, to impeach this testimony. In one breath, the witness testifies he knows of no other document.

“Mr. Mullin: He does not testify to that at all. I am getting tired of counsel sitting here misquoting the record. He said he had no recollection.

“The Referee: He said he had no recollection, and if there is such a document, it is tied in with this letter. I remember that distinctly.

“Mr. Hoffman: Further, he said he had heard from the credit manager of H. E. Casey Company that Scardino was going out of business, and he told him: ‘Better find how much we owe; we will go see Joe and find out what is doing.’ It is perfectly obvious what happened.

“Mr. Pardini: May I ask this question?

“Q. At the time Scardino left, how many jobs were pending for you?

“A. How many was he working on?

“Q. Yes?

“A. They usually run fifteen or twenty at a time.

“Q. The average job amounted to how much when completed?

“A. The average full contract, say, ran \$300. That is the whole contract. He would get 60% when he would put the brown coat on, or \$180.

(Testimony of Thomas J. Culligan, Jr.)

“Q. In other words, you had paid something on account of the fifteen jobs under way?

“A. In every one he had got his brown coat.

“Q. You testified also you knew he was working for other contractors? A. Yes.

“Q. I assume he had one or more houses for the other contractors?

“A. I had no idea. I knew he had other contractors.

“Q. The only discussion was, he was going somewhere to earn some money?

“A. He was quitting business. [170]

“Q. You had no discussion regarding his finances, or anything else? Other than the statement to turn over the moneys in your hands to the three people named in that yellow letter?

“A. That is correct.

“Q. I think you have already answered the question: Pursuant to the instructions in the yellow letter, you paid over the sums, which seem familiar from the job numbers, which are familiar, as set forth in Trustee's Exhibit 'A', the letter of February 18th? A. That is correct.

“Mr. Hoffman: And he also got somebody else to finish the jobs.

“Mr. Pardini: Q. Subsequently Scardino came to the office—I don't know whether you testified to that—and you got somebody to finish the jobs?

“A. Yes.

“Mr. Margolis: Q. Who was manager of San

(Testimony of Thomas J. Culligan, Jr.)

Mateo Feed & Fuel Company at the time this was executed?

“A. I don’t remember his name.

“Q. Was he there at the time this was executed?

“A. No, only the three parties; Mindich, who is the man who phoned me two or three days before we went down here. I remember as plain as if it were yesterday. He said: ‘Joe Scardino is going out of business.’ I said: ‘Funny that did not come direct to me. After all, we have been doing business for five or six years.’

“Q. What was kind of funny?

“A. That it did not come direct to me, after all was said and done. We went to see Joe. He said: ‘I am going into defense work.’ At that time, I told him he should stick with it.

“Q. You did not ask about his other creditors?

“A. I had no occasion to.

“Q. Did you know he owed in excess of what he owed to these two creditors?

“A. No, I knew nothing about his finances. All the years [171] we done business with him, I don’t know the other contractors he dealt with.

“Q. Casey Company didn’t tell you he owed in excess of the moneys you owed him? A. No.

“Q. Neither did Mr. Ferris of the San Mateo Feed & Fuel Company? A. No.

“Q. It struck you rather funny that he was going into defense work?

“A. No. Moreover, he explained he thought he could make more money going into defense work.

(Testimony of Thomas J. Culligan, Jr.)

“Mr. Margolis: That is all.

“Mr. Hoffman: Your Honor, may Mr. Culligan be excused?

“The Referee: Surely.

“(Witness excused).

“JOHN J. DAMONTE,

“Called for Respondents, Sworn.

“The Referee: Q. What is your full name?

“A. John J. Damonte.

“Mr. Hoffman: Q. What is your business address, Mr. Damonte?

“A. 2201 Bay Shore. Business or home?

“Q. Business?

“A. Schlage Lock Company, 2201 Bay Shore.

“Q. You have been with the Schlage Lock Company, how long? A. Since March of 1942.

“Q. In the latter part of 1941 and the early part of 1942, what was your occupation?

“A. I was credit manager for the San Mateo Feed & Fuel Company.

“Q. And, you left them, when?

“A. I believe it was about, I believe it was February 28th.

“Q. Of 1942? A. Of 1942.

“Q. You had been with them how long, as credit manager? A. Since June, 1941.

“Q. You were acquainted with Joe Scardino, were you? A. Yes, sir. [172]

(Testimony of John J. Damonte.)

“Q. And, were you acquainted with the account?

“A. That is right; I was.

“Q. Did you see Joe Scardino between December of 1941 and April, 1942 on frequent occasions?

“A. Generally, almost every day.

“Q. What was the occasion of seeing him?

“A. To collect money for materials due on jobs which he just completed, or on which he was working.

“Q. Did he, during any of that time, tell you he was broke, going out of business?

“A. Absolutely not.

“Q. Was his position, so far as you were concerned, any different than it had been since you had been connected with San Mateo Feed & Fuel Company?

“A. No. The method of handling him was the way many contractors do business and receive payments for material after they receive the final payment.

“Q. Was your method of handling him any different than handling other plastering contractors?

“A. Of course, there was some very good plastering contractors who discounted their bills every month. I had no need to have dealings with them in a credit sense. On plasterers similar to Joe Scardino, they were handled the same way; probably they are still handled the same way.

“Q. That constituted what percentage of plastering contractors in the county?

(Testimony of John J. Damonte.)

“A. That is hard to say. Of course, I am pretty sour on them. I would say about 50%.

“Q. They were all handled in this manner?

“A. That is right.

“Q. Now, did you know, at any time prior to the time that Scardino went into bankruptcy, that he was contemplating going into bankruptcy?

“A. Absolutely not.

“Q. Did you know he could not pay his bills?

“A. I knew he was hard to collect from, but in my [173] experience, I felt he was just one of those tough babies to collect from; it was up to me to keep after him and get the money.

“Q. Did he ever make statements to you as to what was due or what wasn't due, when you asked for money?

“A. ‘As soon as I get the final payment, I will pay you. You don't have to worry about me. I will pay you as soon as I get my money.’

“Q. Did you ever ask him to execute any assignment to you or to the San Mateo Feed & Fuel Company?

“A. Yes, that was the regular practice. Some contractors were reluctant to make that final payment joint. The only other protection we would have would be to lien the job or get an assignment, at which time the main contractor was perfectly free to make a joint check. Merely not to hurt the main contractor's feelings, we got the assignment.

“Q. This assignment dated February 20th you know nothing of that? A. Absolutely nothing.

(Testimony of John J. Damonte.)

“Q. It was not made at your request?

“A. No, sir.

“Q. Did you know at any time that he was having trouble with wage claims, attachments, executions, anything of that nature?

“A. No, no. I amend that; other than this one attachment that I did hear about, but to my knowledge it was subsequently cleared up. He had an attachment on his bank account. Since he never had any money in the bank account anyhow, I wasn't too much concerned with the attachment, since I had to collect the money as he got it on the job.

“Q. Did you know anything about his assets, just what he had and what he did not have?

“A. No, I did not.

“Q. Did you know anything about what he owed aside from the San Mateo Feed & Fuel Company's account?

“A. No, I did not. The Merchants Association in San [174] Mateo, of which the San Mateo Feed & Fuel is a member, had him down as a poor risk, along with the other 50% of the plastering contractors that I mentioned.

“Q. Do you know who Bud Moore is?

“A. Well, do you want to know all I know about him?

“Q. No, just who he is?

“A. He was a former employee, in charge of mixing stucco for San Mateo Feed & Fuel Company. I understand that since he has left.

(Testimony of John J. Damonte.)

“Q. Where is he now?

“A. I understand he is in the service. I haven't seen him since leaving.

“Q. Did Bud Moore ever tell you anything about Scardino's telling him he was going through bankruptcy?

“A. He did tell me that on the morning of the 20th of February, I believe, or right at that time.

“Q. What did he say? You mean the 20th of February?

“Mr. Margolis: Just a minute, may it please Your Honor. I object to the second question on the ground that it is leading and suggestive.

“Mr. Hoffman: We will permit the Judge to be the judge of that.

“The Referee: February 20th is the date.

“The Witness: A. To the best of my knowledge, this took place two years ago; two years, it is very hard to remember since I left and went into an entirely different business. Two years later, there is a possibility of error. I want to put that in anyway.

“To the best of my knowledge, it was around that time.

“Q. How do you fix the time?

“A. By the ledger card of San Mateo Feed & Fuel Company, because at that time we checked up a lot of plaster drums on which there is a certain amount of deposit charged. You better try March 1st; possibly you will get a check-up of those drums.

(Testimony of John J. Damonte.)

“Q. And what was the information you received? What was it Moore told you?

“A. He told me Scardino is thinking of filing bankruptcy.

“Q. Then what did you do?

“A. Then I went and got those barrels, those drums.

“Q. That belonged to you?

“A. That is right.

“Q. That is the first knowledge you had?

“A. Absolutely.

“Mr. Hoffman: I think that is all.

“Cross Examination

“Mr. Margolis: Q. You say you ceased your employment with San Mateo Feed & Fuel Company on February 28, 1942? A. I believe it was.

“Q. Could it have been later or earlier?

“A. I believe it definitely was February 28th.

“Q. You remember that definitely?

“A. That is right.

“Q. You also testified you called on Mr. Scardino every day without exception?

“A. Well, I say every day. He was on my list of people to watch, get your money.

“Q. When did he get on your list of people?

“A. When I went to work for San Mateo Feed & Fuel Company. My predecessor left me a list of accounts I should watch.

“Q. You got that in June, 1941?

“A. Absolutely right.

“Q. You watched Mr. Scardino every day?

(Testimony of John J. Damonte.)

“A. Since that time.

“Q. Without exception?

“A. Not every day. He was in the back of my mind every day, yes.

“Q. You say you found he never had money in the bank, at the time of this attachment that you were familiar with?

“A. Whether I actually had found he had no money in the bank, I don't know. What I mean to say is, I just didn't feel there was any money in there.

“Q. Did you make inquiry? [176]

“A. I may have. I am trying to remember on what I am basing the opinion that the bank account was footless. Maybe the gossip was that he had no money. I know what it is. He had his payroll payment and could not meet the payments back in 1941. I knew at that time there was no use worrying about his bank account, attaching it or anything else to get out money.

“Q. That condition prevailed all through that period until you ceased employment with the San Mateo Feed & Fuel Company?

“A. What condition is that?

“Q. That checks were bouncing on his payroll?

“A. I don't know about that. I know on that one occasion I thought I had discovered something. I said: “Now I know where his bank account is. I don't have to worry”, and undoubtedly, I found out the checks were bouncing and forgot the bank account.

(Testimony of John J. Damonte.)

“Q. When was that, January, 1942?

“A. No, that was in 1941, the fall of '41.

“Q. December or thereabouts?

“A. I haven't the least idea.

“Q. Did you follow your investigation or examination until after the time these checks bounced?

“A. What examination is that?

“Q. To see whether his bank account had improved in any particular?

“A. I gave it no more thought. I thought after that, it is up to me to keep after him, if the contractors were anywhere good.

“Q. You passed this information along to your employer, did you not, to Mr. Ferris?

“A. Well, I don't know.

“Q. Who was your immediate superior?

“A. Mr. Ferris.

“Q. Did he ever ask you about this account?

“A. That is right. [177]

“Q. You went over these accounts you fell heir to from your predecessor in the job? You went over those with Mr. Ferris? A. That is right.

“Q. You had one of those Monday morning meetings at 9:30 before you would go out? How frequently would you discuss these matters with Mr. Ferris?

“A. I don't know. Every now and again when he said: 'We have to get some dough in here.'

“Q. How often would he ask you; would he take it up with you almost every Friday?

(Testimony of John J. Damonte.)

“A. I cannot answer that. Suffice to say, I did get repeated requests to go get some money.

“Q. From Mr. Ferris? A. Yes.

“Q. You told him about these payroll checks bouncing, did you not?

“A. No, I don't think so.

“Q. Did he ask you, or suggest to you that you make an investigation to see what bank Scardino did business with? A. No.

“Q. You did that on your own?

“A. Yes; as credit manager, I was trying to find out as much as I could.

“Q. That was part of your work?

“A. That was part of my work.

“Q. To make a complete investigation?

“A. Yes.

“Q. You made a complete investigation as to Mr. Scardino?

“A. As near as I could. Some of this information is hard to get. Often times a man has hidden angles you don't know about.

“Q. Did you inquire about the hidden angles?

“A. Every way I could.

“Q. You found he had no property?

“A. I knew about the truck he had, and I heard from Bud Moore that Mr. Scardino had a lot in San Mateo.

“Q. San Mateo? A. Yes. [178]

“Q. Did you investigate as to the value of it?

“A. No. Our experience has been in attaching contractors' similar properties, by the time we get

(Testimony of John J. Damonte.)

through filing a suit, getting judgment, enforcing it, we wind up lucky to break even. That is a bad method of betting your money.

“Q. It wasn't enough to go after, in other words? A. Yes.

“Mr. Hoffman: Wait a minute.

“Mr. Margolis: He answered yes. If you have an objection to make, make it to the Court and we will submit the objection.

“Q. You conveyed this information resulting from the investigation you made to Mr. Ferris?

“A. What investigation?

“Q. With respect to your attempt to collect?

“A. I said there was darned little to collect from.

“Q. Did you tell him about the property in San Mateo? A. No.

“Q. Did you tell him about the attachment in San Mateo? A. He knew about that.

“Q. How did he find out?

“A. While I was with the company, we were a member of the Title Guaranty Co., is it? That publishes daily records of all court transactions in Redwood City. We got a copy of that and it was generally read by both Mr. Ferris and me.

“Q. And yourself as credit manager?

“A. That is right.

“Q. Do you know when you read it? Was it December, 1941 or February, 1942?

“A. I haven't the least idea. That had no bearing on my following up his account.

(Testimony of John J. Damonte.)

“Q. You were only there from June, 1941 to February, 1942?

“A. No, it must have been June, 1940.

“Q. Was it closer to that time, that is, your ascertaining?

“A. I am not sure. Let me check. I have a record of [179] when I actually did go to work for San Mateo Feed & Fuel Company.

“Q. That is not important.

“A. You are stressing the date. I want to be sure. You are making it important in my mind, at any rate. June, 1941, is correct.

“Q. Now, having that date in mind, having in mind about ascertaining about the attachment, can you tell us whether it was clear to the time you made connection with San Mateo Feed & Fuel or to the time you severed your connection with San Mateo Feed & Fuel Company?

“A. I do not know. I absolutely do not know. In fact, the whole incident is really vague. There was that little importance attached to it at the time.

“Q. And did you tell Mr. Ferris, in your investigation of this matter, about this lot? I don't recall whether I asked you this or you answered it: About this piece of property in San Mateo County? Did you tell Mr. Ferris about that?

“A. No. I did not check into it to check into the court records to see if there was a lot. I just had this hearsay from Bud Moore, who assured me he was a good friend of Mr. Scardino and I did not have to worry about collecting the money.

(Testimony of John J. Damonte.)

“Q. Your investigation revealed he had nothing, no money in the bank?

“A. What investigation? By investigation, I checked with our membership in the Credit Men’s Association. That is as far as an investigation I could make, other than going around to the contractors and seeing how much money he had coming and how much we should get out of it for material.

“Q. So far as you know from your contacts with the credit association and with the bank, however, you found out he had no money in the bank and no other property? [180]

“Mr. Hoffman: I submit that has been asked and answered.

“The Witness: A. No, I would not say that.

“Mr. Hoffman: All right.

“Mr. Margolis: Q. What would you say, Mr. Damonte?

“A. I don’t know what you are driving at. Do you want definite answers to definite questions? I am willing to make them, Your Honor.

“The Referee: Answer the question.

“A. I would like to know definitely what the question is.

“Mr. Margolis: I think the question is plain, Your Honor.

“(Question read.)

“Mr. Hoffman: That assumes facts not in evidence, if Your Honor please.

“The Referee: What does it assume, not in evidence?

(Testimony of John J. Damonte.)

“Mr. Hoffman: His investigation with the bank. He has testified there was no investigation.

“The Referee: That is true.

“Mr. Margolis: I will reframe the question.

“Q. Your inquiries made from this credit association revealed that he had no property and that he was a poor risk. Is that correct?

“A. No. The same classification as a lot of other plasterers: ‘Be very careful in handling this account.’

“Q. You knew that right along?

“A. That is correct; I knew that right along, that he, as a plasterer, was one to watch.

“Q. However, you found out about this attachment at the bank. Did you make inquiry, after you found out, from the bank or other source?

“A. I did not make inquiry.

“Mr. Margolis: That is all.

“The Referee: Anything else?

“Mr. Hoffman: I have no further questions.

[181]

“(Witness excused.)

“JULES MINDNICH

called for Respondents, Sworn.

“Mr. Mullin: Q. Your name is Jules Mindnich?

“A. Yes.

“Q. You were credit manager for H. E. Casey Company in 1941 and 1942. Is that correct?

(Testimony of Jules Mindnich.)

“A. Up to May of 1942.

“Q. You know Joe Scardino, the bankrupt?

“A. Yes.

“Q. Did Mr. Scardino ever tell you he was broke? A. No.

“Q. Did he ever tell you he was insolvent?

“A. No.

“Q. Did he ever tell you he was contemplating bankruptcy? A. No.

“Q. Did he ever tell you he could not pay his bills? A. No.

“Cross Examination

“Mr. Margolis: Q. Do you know Mr. Damonte, who just testified?

“Mr. Mullin: To which I object. This is cross examination; it hasn't been disputed by the issues or the question asked the witness.

“Mr. Margolis: Q. What was your capacity at Casey Company?

“A. Credit manager.

“Q. Did Casey Company belong to the same association mentioned by Mr. Damonte?

“Mr. Mullin: To which I object on the ground that it is incompetent, irrelevant and immaterial.

“The Witness: They belonged to no association.

“Mr. Margolis: Q. Do you know Mr. Ferris?

“Mr. Mullin: To which I object as being improper cross examination.

“The Referee: That is true. Listen to the questions [182] he asked. He limited his questions.

“Mr. Margolis: Q. Did you ever speak with

(Testimony of Jules Mindnich.)

Mr. Scardino about the deficiency, or the account owed to your employer?

“Mr. Mullin: To which I object as not being proper cross examination.

“The Referee: Oh, yes. He said he never told him he was insolvent.

“Mr. Margolis: He asked if he ever told him he was insolvent, unable to pay his bills, broke, or contemplating bankruptcy?

“The Referee: He may answer this question. Answer the question.

“(Question read.)

“Mr. Mullin: That is a compound question. I object on the ground that it is compound.

“The Referee: That is true. Objection sustained.

“Mr. Margolis: Q. Did you ever speak to Mr. Scardino——

“The Witness: A. Yes.

“Q. Did you ever speak to Mr. Scardino with respect to the account he owed H. E. Casey Company? A. Yes.

“Q. When was the last time you spoke to him about it?

“A. Oh, I would say the last time I saw him, whenever that was.

“Mr. Pardini: That is stipulated.

“Mr. Margolis: Q. When was the last time you saw him, Mr. Mindnich?

“A. The last time I saw him was when he signed this letter.

(Testimony of Jules Mindnich.)

“Q. You did not see him after that at all?

“A. No.

“Q. Can you give the facts or circumstances that arose which caused that letter to be signed?

“A. Yes. I tried to find Joe Scardino for about a week.

“Q. Was he hiding, Mr. Mindnich?

“A. I don't know. I could not find him. I could not locate him anywhere. [183]

“Q. Did you try him at his home?

“A. I did not know where he lived. He always came into the office. I did not know what his home address was; I had to get it from the union. The union gave it to me and then I went down.

“Q. What was the discussion when that was signed?

“A. I wanted to know what was wrong. I heard from somebody else.

“Q. You wanted to know, what?

“A. What was wrong.

“Q. About what?

“A. With Joe; whether he was sick, or what.

“Q. You just said you heard something?

“A. I heard he was working. I tried to find him. I wanted to talk to him. Sure enough, I went down once and he was not home; then I went again when he came back from work, I went back again.

“Q. Was that on the 20th of February?

“A. Yes.

“Q. That is a total of two trips. You went

(Testimony of Jules Mindnich.)

there, he was at work; then, you went back?

“A. No. We had one conversation and he went out to the grocery store or some place.

“Q. You waited while he went to the grocery store? A. That is right.

“Q. Didn't you see him once and leave to prepare that paper and come back?

“A. No. I had the information on that paper when I went down.

“Q. You heard Mr. Culligan testify a minute ago, didn't you? A. Yes.

“Q. You were sitting in the court room?

“A. Right.

“Q. That you went and spoke with Mr. Scardino first—

“A. No, I didn't hear him say that.

“Q. Then left and went back to the office of Conway & Culligan?

“A. I heard him say so, yes, a couple of times.

“Q. Drew that document and then returned to Mr. Scardino's [184] home. Did you hear him testify to that? A. No.

“Q. You did not? Do you know when was the time prior to February 20th that you saw Mr. Scardino?

“A. It must have been about a week.

“Q. What was the occasion for seeing him then?

“A. No particular occasion, except I seen him whenever I went the rounds. If he was around, I would talk to him.

“Q. What did you talk to him about?

(Testimony of Jules Mindnich.)

“Mr. Mullin: It is stipulated he would say: ‘How do you do.’ We are getting very far afield.

“Mr. Margolis: The parrot-like answers to the questions——

“Mr. Mullin: To which I object, if it please the Court. If counsel will pay any attention to his rules of evidence, the proper procedure and rules of evidence in answering a question is to answer yes or no and give an explanation. We are attempting to expedite this. Your Honor wants to go home, so does the reporter.

“The Referee: Ask a question.

“Mr. Margolis: There is a question pending.

“The Referee: What did you talk to him about? That is the question.

“The Witness: A. Anything. ‘How are you Joe.’

“Mr. Margolis: Q. You were the credit manager for H. E. Casey Company at that time?

“A. Yes.

“Mr. Margolis: No further questions, Your Honor.

“(Witness excused.)

“Mr. Mullin: Submitted.

“Mr. Hoffman: Submitted, Your Honor.

“(Submitted.)”

(See original of Reporter’s Transcript of proceedings of November 22, 1943, pages 2 to 65, inclusive, handed up herewith as a part of this certificate and report.) [185]

Subsequently, and on December 27, 1943, the following order was entered herein:

“Whereas, the matters involved herein came before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

“Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 McAllister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430)—\$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—\$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—\$59.12; Blake-Moffit-Towne Paper Co., 599 Eighth Street, San Francisco—\$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—\$331.00; Frank Peri, 920 South Idaho, San Mateo, California—\$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—\$75.00, and

“Whereas, after the aforesaid hearings, the mat-

ters were submitted, and the court, now being advised fully in the premises, finds that:

“(1) On April 29, 1942, the above-named bankrupt’s petition for adjudication in bankruptcy was filed herein;

“(2) On May 21, 1942, G. S. Hayward, became, ever [186] since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt’s estate;

“(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of \$2,534.76, assigned to H. E. Casey Company, and the sum of \$1,025.35 assigned to San Mateo Feed and Fuel Co.;

“(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt’s petition to be adjudicated a bankrupt, and said assignments were, and each of them was, without any consideration therefor;

“(5) At the time of the making of said assignment by the bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

“(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

“(7) When said assignment was made to said

H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of \$2,534.76;

“(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of \$1,025.35;

“(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt; [187]

“(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

“(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to said last mentioned trustee to be administered herein as a part of the estate of said bankrupt;

“(12) Said H. E. Casey Company is holding said sum of \$2,534.76 without color or right of title

thereto or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

“(13) Said San Mateo Feed & Fuel Co. is holding said sum of \$1,025.35, without color or right of title therto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

“The court, therefore, concludes as matters of law that:

“(1) Said trustee in bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$2,534.76, and [188]

“(2) Said trustee in *bankrupt*, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$1,025.35 by said San Mateo Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$1,025.35:

“It Hereby Is Ordered, Adjudged and Decreed that:

“(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt the sum of \$2,534.76, and the whole thereof, and

“(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed, quali-

fied and acting trustee of the estate of the above-named bankrupt the sum of \$1,025.35, and the whole thereof.

“Dated: December 27, 1943.

“BURTON J. WYMAN

“Referee in Bankruptcy”

(See original of said order handed up herewith as a part of this certificate and report.)

In due time, and on February 26, 1944, the following verified petition for review was filed herein by F. E. Hoffmann, Esq., and Arthur P. Shapro, Esq., on behalf of San Mateo Feed and Fuel Co.:

“Comes now San Mateo Feed and Fuel Co., a corporation, and respectfully represents:

“That heretofore, and on the 27th day of December, 1943, Hon. Burton J. Wyman, Referee in Bankruptcy of the above-entitled Court, made, signed and filed herein that certain ‘Order Directing San Mateo Feed and Fuel Co. and H. E. Casey Company to Turn Over Certain Moneys to Trustee,’ a full, true and correct copy of which is hereto annexed, marked Exhibit ‘A’, and hereby expressly referred to and made part hereof.

“That said Referee’s Order, dated December 27, 1943, adversely affects your Petitioner in so far as it orders your Petitioner to forthwith turn over to the Trustee of the estate of the above-named Bankrupt, the sum of \$1,025.35, and the whole thereof. [189]

“That said Referee’s Order, dated December 27,

1943, and each and every part thereof, was and is erroneous and contrary to law, and more particularly,

“(1) That said Referee’s Order is not supported by, and is contrary to, the evidence adduced by said Trustee and by your Petitioner upon the hearing and upon the further hearing of said Trustee’s Petition for Turnover Order, filed herein on April 2, 1943, and upon the Order to Show Cause thereon issued herein on said 2nd day of April, 1943.

“(2) That the Findings of said Referee, contained in his said Order dated December 27, 1943, to wit, Findings numbered (3), (4), (6), (8), (10), (11), and (13) thereof, are not supported by and are contrary to the evidence adduced by said Trustee and by your Petitioner upon the aforesaid hearing and further hearing of said Trustee’s Petition for Turnover Order and the Order to Show Cause thereon.

“(3) That said Trustee’s Petition for Turnover Order, filed herein on said 2nd day of April, 1943, does not state facts sufficient to warrant the granting, by this Court, to said Trustee, of the relief therein prayed for and/or granted to said Trustee by said Referee’s Order dated December 27, 1943.

“(4) That said Referee improperly received and considered as evidence, as against this Petitioner, upon the said hearing and further hearing of said Petition for Turnover Order, all of the records of the above-entitled proceeding, including the Bankrupt’s Schedule and the ex parte Affidavit filed by the Bankrupt in support of the Trustee’s Petition

for Review of the Referee's original Order on Petition of Trustee And Order to Show Cause Based Thereon, dated September 15, 1943, in that both said Schedule and said ex parte Affidavit were and are not binding upon your Petitioner and constitute hearsay as against your Petitioner.

“(5) That all of the evidence adduced upon the said [190] hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon issued herein, is insufficient to warrant this court in granting to said Trustee the relief contained in said Referee's Order of December 27, 1943.

“(6) That the evidence adduced upon said hearing and further hearing of said Trustee's Petition for Turnover Order and the Order to Show Cause thereon issued herein, shows affirmatively, and contrary to the Findings of said Referee, contained in his said Order of December 27, 1943, that the assignment of said sum of \$1,025.35 to your Petitioner by the Bankrupt was made more than four months prior to the commencement of the above-entitled proceedings, and was so made for a present valuable and adequate consideration; and that even if made within said four months prior to the commencement of the above-entitled proceedings, said assignment was then made for a current valuable and adequate consideration.

“(7) That it affirmatively appears from the evidence adduced upon said hearing and further hearing of said Trustee's Petition for Turnover Order

and the Order to Show Cause thereon, and contrary to the Findings of said Referee, contained in his Order of December 27, 1943, that in and by the aforesaid assignment of the sum of \$1,025.35 to your Petitioner, the estate of the Bankrupt was not depleted to the extent of that sum, or any sum, or at all; and that said assignment did not enable your Petitioner to secure an undue advantage over other creditors of said Bankrupt of the same class; and more particularly, that your Petitioner was, at all of the times herein mentioned, a secured creditor and not an unsecured creditor of said Bankrupt.

“8. That it does not appear from the evidence adduced upon the said hearing and further hearing of said Trustee’s [191] Petition for Turnover Order and the Order to Show Cause thereon, nor is it a fact, that at the time of the making of the assignment of said sum of \$1,025.35 to your Petitioner by said Bankrupt, even if such assignment took place, as alleged by said Trustee, within the four months next preceding the commencement of the above-entitled proceedings, said Bankrupt was then and there insolvent, nor that your Petitioner, at the time of the making of such assignment, had reasonable cause to believe that said Bankrupt was then and there insolvent.

“9. That it does not appear from the evidence adduced upon the said hearing and further hearing of said Trustee’s Petition for Turnover Order and the Order to Show Cause thereon, that the estate of the above-named Bankrupt is itself, with respect

to the claims of creditors on file, approved and allowed herein, insolvent, and/or that the assets in the hands of said Trustee are insufficient to pay all of the claims of creditors so filed, approved and allowed herein in full.

“Wherefore, your Petitioner, feeling aggrieved, as aforesaid, by reason of said Referee’s Order dated December 27, 1943, prays that said Referee’s Order, a full, true and correct copy of which is hereto annexed and marked Exhibit ‘A’ hereof, may be, by the Judge of the above-entitled Court, reviewed, pursuant to the provisions of the Acts of Congress Relating to Bankruptcy, and more particularly, to Section 39c thereof; and that said Referee’s Order, dated December 27, 1943, may be thereafter, by said Judge of this Court, reversed; or for such other, further or different order or relief as to the Judge of this Honorable Court may seem just in the premises.

“SAN MATEO FEED AND
FUEL CO.

“By ARTHUR P. SHAPRO

“Its Attorney

“Petitioner

“F. E. HOFFMANN

and

“ARTHUR P. SHAPRO

“Attorneys for Petitioner”

[For the sake of brevity, the verification and Exhibit "A" attached to said petition, are omitted, said exhibit being a copy of the order of December 27, 1943, hereinbefore set forth in full.]

(See original of said last mentioned petition of San Mateo Feed and Fuel Co. handed up herewith as a part of this certificate and report.)

DISCUSSION BY AND OPINION OF REFEREE

Because, for the most part, the objections raised to the order in controversy appear to go to the proposition that there was insufficient evidence before the court to justify said order, I do not believe that anything I could say at this time would be of any assistance to the court in determining the correctness, or incorrectness, of the complained-of order. The record herein is complete and speaks for itself.

There is a proposition apart from the contention as to the insufficiency of evidence which, in my opinion, deserves mention. On page 134 of the herein certificate and report the following appears:

"4. The said Referee improperly received and considered as evidence, as against this Petitioner, upon the said hearing and further hearing of said Petition for Turnover Order, all of the records of the above-entitled proceeding, including the Bankrupt's Schedule and the ex parte Affidavit filed by the Bankrupt in support of the Trustee's Petition for Review of the Referee's original Order on Petition of

Trustee And Order to Show Cause Based Thereon, dated September 15, 1943, in that both said Schedule and said ex parte Affidavit were and [193] are not binding upon your Petitioner and constitute hearsay as against your Petitioner.”

An examination of the record herein, however, clearly shows, I believe, that the affidavit referred to in the present petition for review herein was used solely for one purpose, i.e., as a part of the trustee's offer of proof mentioned in said trustee's petition for review. (Pages 62 to 67 hereof, inclusive).

Furthermore, the record shows beyond question that the bankrupt not only was examined, but also was cross-examined in connection with certain matters which were dealt with in his affidavit which, as I read the record, was not used upon the further hearing, except only to the extent that counsel for the trustee mentioned it in framing certain questions propounded to the bankrupt during the further hearing. It, therefore, would appear that respondent's only purpose in bringing said affidavit into the record in connection with the present petition for review is in the hope of obtaining a rehearing on trustee's petition for review which, by the District Court's order of October 4, 1943, resulted in the further hearing out of which respondent's present petition for review arises.

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(2) Affidavit of Service of Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(3) Affidavit of Service of Notice of Further Hearing of Trustee's Petition for a Turnover Order;

(4) Reporter's Transcript of Proceedings of November 22, 1943;

(5) Order Directing San Mateo Feed and Fuel Co. and H. E. [194] Casey Company to Turn Over Certain Moneys to Trustee;

(6) Order Extending Time to File Petition for Review;

(7) Order Extnding Time to File Petition for Review;

(8) Order Extending Time to File Petition for Review;

(9) Order Extending Time to File Petition for Review; and

(10) Petition for Review.

Dated: July 20, 1944.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jul. 20, 1944. [195]

[Title of District Court and Cause.]

NOTICE OF FURTHER HEARING OF TRUSTEE'S PETITION FOR A TURNOVER ORDER

To H. E. Casey Company, Respondent, and Hugh F. Mullin, Esq., Its Attorney, San Mateo Feed and Fuel Company, Respondent, and F. E. Hoffmann, Esq., Its Attorney, Joseph Louis Scardino, Bankrupt, and Julian Pardini, Esq., His Attorney:

You and Each of You Will Please Take Notice and You Are Hereby Notified that the further hearing of the Trustee's petition for a turnover order will be held before the Honorable Burton J. [196] Wyman, Referee In Bankruptcy, at his courtroom, #609 Grant Building, Seventh and Market Streets, San Francisco, California, on the 22nd day of November, 1943, at the hour of 2:00 o'clock P. M., of said day or as soon thereafter as counsel may be heard.

Dated: San Francisco, California, November 8, 1943.

G. S. HAYWARD

Trustee

MAX H. MARGOLIS

Attorney for Trustee

[Endorsed]: Filed with Referee Nov. 8, 1943.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[197]

[Title of District Court and Cause.]

ORDER DIRECTING SAN MATEO FEED AND
FUEL CO. AND H. E. CASEY COMPANY
TO TURN OVER CERTAIN MONEYS TO
TRUSTEE

Whereas, the matters involved herein came before the court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh [198] F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 McAllister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430—\$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—\$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—\$59.12; Blake-Moffit-Towne Paper Co., 599 Eighth Street, San Francisco—\$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—\$331.00; Frank Peri, 920 South

Idaho, San Mateo, California—\$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—\$75.00, and

Whereas, after the aforesaid hearings, the matters were submitted, and the court, now being advised fully in the premises, finds that:

(1) On January 29, 1942, the above-named bankrupt's petition for adjudication in bankruptcy was filed herein;

(2) On May 21, 1942, G. S. Hayward became, ever since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt's estate;

(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of \$2,534.76, assigned to H. E. Casey Company, and the sum of \$1,025.35 assigned to San Mateo Feed and Fuel Co.;

(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt, and said assignments were, and each of them was, without any consideration therefor;

(5) At the time of the making of said assignment by the [199] bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said

time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of \$2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of \$1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to

said last mentioned trustee to be administered herein as a part of the estate of said bankrupt.

(12) Said H. E. Casey Company is holding said sum of \$2,534.76 without color or right of title thereto or any part there- [200] of, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

(13) Said San Mateo Feed and Fuel Co. is holding said sum of \$1,025.35 without color or right of title thereto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

The court, therefore, concludes as matters of law that:

(1) Said trustee in bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$2,534.76, and

(2) Said trustee in *bankrupt*, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$1,025.35 by said San Mateo Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$1,025.35:

It Hereby Is Ordered, Adjudged and Decreed that:

(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named

bankrupt the sum of \$2,534.76, and the whole thereof, and

(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed qualified and acting trustee of the estate of the above-named bankrupt the sum of \$1,025.35, and the whole thereof.

Dated: December 27, 1943.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed with Referee Dec. 27, 1943.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[201]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable, the above entitled Court and
Burton J. Wyman, Referee in Bankruptcy:

H. E. Casey Company, a co-partnership, being aggrieved because of the Order made and entered by the above entitled Court on the 27th day of December, 1943, prays that same may be reviewed as provided in the Bankruptcy Act of 1898, and amendments thereof, and said petitioner respectfully shows:

I.

That in the course of the proceedings on the said 27th day of December, 1943, an Order, a copy of which is hereto annexed and marked Exhibit "A", was made and entered herein. [202]

II.

That pursuant to application duly made by petitioner and Orders made and entered in the above entitled proceedings, petitioner's time within which to file its Petition for Review of said Order was extended to and including the 27th day of February, 1944.

III.

That said Order was and is erroneous in that said Order is contrary to law.

IV.

That said Order is contrary to the evidence.

V.

That said Order is contrary to equity.

VI.

That said Order is unsupported by evidence.

VII.

That the trustee's petition, pursuant to which said Order was made and entered, did not state facts sufficient to warrant the Court to make and enter said Order or any Order against petitioner.

VIII.

That the Referee erred in receiving and considering evidence improperly admitted upon said hearing to the prejudice of said petitioner in allowing and receiving in evidence all of the records of the above entitled proceedings including the schedule and ex parte affidavit filed by the bankrupt notwith-

standing said evidence was and is "hear-say" as against this petitioner for review.

IX.

That the said Order of the Referee is erroneous in that the evidence offered, introduced and received by him upon the hearing failed to support any of the elements necessary or required [203] in a proceeding to set aside an alleged voidable preferential transfer.

X.

That the Referee erred in making said Order to the prejudice of petitioner for review in the following particulars:

(a) The findings of the Referee set forth in said Order are not supported by the evidence or any inference to be drawn therefrom and are contrary to the evidence.

(b) The findings of the Referee that the alleged transfer by the bankrupt herein to petitioner was made without consideration is contrary to the evidence in that it affirmatively shows that good, valuable, and present consideration was given by said petitioner for review to said bankrupt for and in consideration of the monies paid over to said petitioner.

(c) That it affirmatively appears from the record of the evidence introduced and received by the Referee that the said alleged transfer was made more than four months prior to the date of the commencement of the above entitled proceedings and that said Referee was without jurisdiction to make an Order against said petitioner directing said petitioner to turn over to the trustee the sum of

Two Thousand Five Hundred Thirty-Four and 76/100 (\$2,534.76) Dollars or any other sum, or at all.

(d) That it does not appear from the evidence nor any of the pleadings filed herein nor from the Order of the Referee that the money received by said petitioner from Conway and Culligan depleted any estate of said bankrupt or any property which was available to the general unsecured creditors of said bankrupt.

(e) That it affirmatively appears from the record of the evidence introduced and received before the Referee in Bankruptcy upon the hearing that the said sum of Two Thousand Five Hundred Thirty-Four and 76/100 (\$2,534.76) Dollars found by the Referee to be a part of the bankrupt estate was in truth and in fact the [204] property of said petitioner and held for the account of said petitioner by Conway and Culligan, the transferor of said funds, pursuant to a contract entered into by and between petitioner and Conway and Culligan more than four months prior to the filing of the bankrupt's petition wherein and whereby said Conway and Culligan agreed to pay to petitioner the said sum of Two Thousand Five Hundred Thirty-Four and 76/100 (\$2,534.76) Dollars for and in consideration of materials delivered to said bankrupt.

(f) That it affirmatively appears from the records of the above entitled proceedings that any writings executed by and between the bankrupt, petitioner and/or Conway and Culligan within four

months prior to the filing of said Petition in Bankruptcy did not convey or transfer to petitioner any property belonging to said bankrupt and/or depleted any of his estate subject to administration by the above entitled Court.

(g) That it affirmatively appears from the evidence that the said petitioner was and is a secured creditor and that such security was obtained for a valuable consideration more than four months prior to the date of the commencement of the above entitled proceedings.

(h) That said Order of the Referee is contrary to evidence in that all of the legal evidence admitted or received before the Referee upon the hearing established without dispute that said bankrupt was solvent upon the date of the alleged transfer asserted by the trustee in his said petition.

(i) That said Order of the Referee is not supported by any evidence purporting to show that on the date upon which said alleged transfer was made to petitioner, and which is sought to be set aside by the trustee, that said bankrupt was insolvent within the meaning of the Bankruptcy Act.

(j) That said Order of the Referee is unsupported by any evidence to show that petitioner received a greater percentage of [205] its claim against said bankrupt than the other general unsecured creditors of the Bankrupt.

(k) That the said Order of the Referee is erroneous in that the evidence affirmatively shows that said petitioner did not have knowledge or reasonable cause to believe that said bankrupt was insolvent on the date the trustee alleges said transfer was made.

Wherefore, your petitioner, feeling aggrieved as aforesaid because of said Order of the Referee, prays that same may be reviewed by the Judge as provided for in the Bankruptcy Act of 1898 as amended and that the transcript of testimony and exhibits received by the Referee upon said hearing be certified and transmitted to the Judge of the above entitled Court.

That the said Order of the Referee be reversed.

That the judge make such further and other Order or Orders in the premises as may be meet and proper.

H. E. CASEY COMPANY

.....

Petitioner

HUGH F. MULLIN JR.

ERNEST J. TORREGANO

Attorneys for Petitioner [206]

United States of America

Northern District of California

County of San Mateo—ss.

H. E. Casey, being first duly sworn, deposes and says:

That he is one of the partners of H. E. Casey Company, a co-partnership, the petitioner for review herein; that he makes this verification for and on behalf of said co-partnership; that he has read said Petition for Review, knows the contents thereof and hereby makes solemn oath that the statements therein contained are true, according to his best knowledge, information and belief.

H. E. CASEY [207]

EXHIBIT "A"

In the Southern Division of the United States
District Court for the Northern District of
California

No. 34909-S

In Bankruptcy

In the Matter of

JOSEPH LOUIS SCARDINO

Bankrupt.

ORDER DIRECTING SAN MATEO FEED AND
FUEL CO. AND H. E. CASEY COMPANY
TO TURN OVER CERTAIN MONEYS TO
TRUSTEE

Whereas, the matters involved herein came before the Court on the petition of G. S. Hayward, the trustee of the estate of the above-named bankrupt, represented by Max H. Margolis, Esq., the order to show cause based upon said petition, the answer of San Mateo Feed and Fuel Co., a corporation, represented by F. E. Hoffman, Esq., the answer of H. E. Casey Company, a copartnership, represented by Hugh [208] F. Mullins, Jr., Esq., the evidence taken upon the original hearing and the further hearing on said petition, order to show cause, and said answers to said petition and order to show cause, and

Whereas, the record herein, particularly schedule A-3 of the bankrupt, shows that the following creditors are listed as those whose claims are unsecured: State Compensation Ins. Fund, 445 Me-

Allister Street, San Francisco, California, 1940 and 1941 (San Francisco Municipal Court action number 162,430)—\$344.30; Industrial Indemnity Co., San Francisco, California, 11/6 to 12/6-41—\$74.80; Industrial Indemnity Co., San Francisco, California, 12/6 to 1/6-42—\$59.12; Blake-Moffitt-Towne Paper Co., 599 Eighth Street, San Francisco—\$74.00; Markus Cut-Rate Hardware, Seventh & Washington Sts., Oakland—\$331.00; Frank Peri, 920 South Idaho, San Mateo, California—\$900.00, and Sequoia Grocery Market, 2525 Broadway, Redwood City, California—\$75.00, and

Whereas, after the aforesaid hearings, the matters were submitted, and the court, now being advised fully in the premises, finds that:

(1) On April 29, 1942, the above-named bankrupt's petition for adjudication in bankruptcy was filed herein;

(2) On May 21, 1942, G. S. Hayward became, ever since has been, and now is the duly appointed, qualified and acting trustee of the above-named bankrupt's estate;

(3) On said date of said filing of said petition, as hereinbefore set forth, said bankrupt had assets, among them being the sum of \$2,534.76, assigned to H. E. Casey Company, and the sum of \$1,025.35 assigned to San Mateo Feed and Fuel Co.;

(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt,

and said assignments were, and each of them was, without any consideration therefor;

(5) At the time of the making of said assignment by the [209] bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed & Fuel Co. had reasonable cause to believe that said bankrupt was insolvent;

(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of \$2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of \$1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Co., said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt;

(11) Upon the filing of said petition for said adjudication in said bankruptcy, each of the aforesaid sums, which in fact and in law was held in trust by the respective assignees for the benefit of the estate of said bankrupt and all the creditors thereof, passed into the custody of the bankruptcy court, and, upon the appointment and qualification of the aforesaid trustee in bankruptcy, passed to said last mentioned trustee to be administered herein as a part of the estate of said bankrupt;

(12) Said H. E. Casey Company is holding said sum of \$2,534.76 without color or right of title thereto or any part there- [210] of, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof, and

(13) Said San Mateo Feed and Fuel Co. is holding said sum of \$1,025.35 without color or right of title thereto and/or any part thereof, except as a de facto trustee for the estate of said bankrupt and all the creditors thereof.

The court, therefore, concludes as matters of law that:

(1) Said trustee in Bankruptcy, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$2,534.76 from said H. E. Casey Company and that said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$2,534.76, and

(2) Said trustee in bankrupt, G. S. Hayward, is entitled to have turned over to the estate of said bankrupt the sum of \$1,025.35 by said San Mateo

Feed and Fuel Co., and said last mentioned company should forthwith turn over to said last mentioned trustee in bankruptcy said sum of \$1,025.35;

It Hereby Is Ordered, Adjudged and Decreed that:

(1) H. E. Casey Company forthwith turn over to G. S. Hayward, as the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt the sum of \$2,534.76, and the whole thereof, and

(2) San Mateo Feed and Fuel Co. forthwith turn over to G. S. Hayward, as the duly appointed qualified and acting trustee of the estate of the above-named bankrupt the sum of \$1,025.35, and the whole thereof.

Dated: December 27, 1943.

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed with Referee Feb. 25, 1944.

[Endorsed]: Filed with Clerk Jul. 20, 1944.

[211]

In the United States District Court, for the
Northern District of California, Southern
Division

No. 34909-S

In the Matter of

JOSEPH LOUIS SCARDINO,

Bankrupt.

ORDER CONFIRMING PROCEEDINGS AND
FINDINGS OF REFEREE

Ordered:

1. The proceedings and findings set forth in the Certificates and Reports of Referee on petition for review filed on behalf of H. E. Casey Company on February 25, 1944, and on petition for review filed on behalf of San Mateo Feed & Fuel Company on February 26, 1944, are approved and confirmed.

2. The order of the Referee dated December 27, 1943, requiring said petitioners to turn over to the trustee of the estate of the above-named bankrupt certain sums of money is hereby affirmed and adopted.

3. It appearing that there was no actual fraud on the part of petitioners in accepting the preferential payments complained of by the trustee, and it appearing that they have not filed creditors claims in said bankruptcy [212] proceeding, they will be permitted, if so advised, to file such claims within thirty days from the date hereof. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356; *Page v. Rogers*, 211 U. S. 575; *Hair v. Byars*, 92 F. (2d) 684.

4. The record in the matter is returned to the Referee for further proceedings.

Dated: October 13, 1944.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Oct. 13, 1944. [213]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice is hereby given that San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain Order and Judgment made and entered in the above-entitled proceedings by the Honorable A. F. St. Sure, Judge of the above-entitled Court, on the 13th day of October, 1944, wherein and whereby said Court affirmed and adopted [214] the Order of Honorable Burton J. Wyman, Referee in Bankruptcy, dated December 27, 1943, directing Appellants to turn over certain moneys to G. S. Hayward, Trustee of the estate of the above-named Bankrupt, and returning to said Referee the aforesaid matter for further proceedings.

Dated at San Francisco, in said District, this 10th day of November, 1944.

SAN MATEO FEED & FUEL
CO., a corporation,
By F. E. HOFFMANN
and
ARTHUR P. SHAPRO
Its Attorneys
H. E. CASEY COMPANY,
a copartnership,
By ERNEST J. TORREGANO
and
HUGH F. MULLIN, JR.
Its Attorneys
Appellants.

[Endorsed]: Filed Nov. 10, 1944. [215]

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, the Appellants in the above proceeding, have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from an Order and Judgment made and entered on the 13th day of October, 1944, against said Appellants in said proceeding in the above-entitled Court in favor of G. S. Hayward, as Trustee of the estate of the Bankrupt above-named. [216]

Now, Therefore, in consideration of the premises, and of such appeal, American Surety Company of New York, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact a surety business in the State of California, does hereby undertake and promises on the part of said Appellants, that said Appellants will pay all costs of said appeal which may be awarded against them if said Judgment of said District Court is affirmed or if said appeal is dismissed, together with such costs as said Appellate Court may award if said Judgment is modified, not exceeding the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It Is Further Stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above-named District Court may, upon notice of not less than ten (10) days to the undersigned surety, proceed summarily in said proceeding or suit to ascertain the amount which said surety is bound to pay on account of such breach, and return judgment therefor against said surety and award execution therefor.

Signed, sealed and dated this 9th day of November, 1944.

AMERICAN SURETY COMPANY OF NEW YORK

By L. T. PLATT

Res. Vice-Pres.

Attest:

[Seal]

B. D. SPERRY

Resident Asst. Secretary.

Bond #903454-K

Premium \$10.00 per annum. [217]

State of California

City and County of San Francisco—ss.

On this 9th day of November, in the year one thousand nine hundred and forty-four before me, Thomas A. Dougherty, a Notary Public in and for said City and County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. T. Platt and B. D. Sperry known to me to be the Resident Vice-President and Resident Assistant Secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in

the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] THOMAS A. DOUGHERTY

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 10, 1947.

[Endorsed]: Filed Nov. 10, 1944. [218]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75 (a)

To the above-entitled Court, and to C. W. Calbreath, Esq., Clerk of said Court, and to G. S. Hayward, as Trustee of the Estate of the above-named Bankrupt, and to Max H. Margolis, Esq., her attorney:

Come now San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, Appellants herein, and, in accordance with Rule 75(a) of the Federal Rules of Civil Pro- [219] cedure, designate the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, notice of which said Appeal was heretofore filed herein on the 10th day of November, 1944, viz:

1. Order of Adjudication.
2. Trustee's Petition for Turnover Order and Order to Show Cause issued thereon, dated April 2, 1943.

3. Answer of H. E. Casey Company to said Petition for Turnover Order.

4. Answer of San Mateo Feed & Fuel Co. to said Petition for Turnover Order.

5. Order on Petition of Trustee and Order to Show Cause based thereon, dated September 15, 1943.

6. Certificate and Report of Referee on Petition for Review of Referee's Order of September 15, 1943, (which includes said Petition for Review and the Affidavit of Bankrupt, dated September 23, 1943, in support thereof).

7. Order of District Judge, made on October 4, 1943, upon said Referee's Certificate and Report on Petition for Review of Referee's Order of September 15, 1943.

8. Notice of further hearing of Trustee's Petition for a Turnover Order, dated November 8, 1943.

9. Order (of Referee) directing San Mateo Feed & Fuel Co. and H. E. Casey Company to turn over certain moneys to Trustee, dated December 27, 1943.

10. Certificate and Report of Referee on Petition for Review filed on behalf of San Mateo Feed & Fuel Co. on February 26, 1944, (which includes a transcript of all the evidence adduced before said Referee upon said Trustee's Petition for Turnover Order at both the original and at the further hearing thereof, together with the said Petition for Review filed [220] February 26, 1944.

11. Petition for Review (of Referee's Order of December 27, 1943) filed by H. E. Casey Company, a copartnership, on February 25, 1944.

12. Order Confirming Proceedings and Findings of Referee (made by District Judge), dated October 13, 1944.

13. Trustee's Exhibit No. 1, dated April 2, 1943.

14. (Appellants') Notice of Appeal, dated November 10, 1944.

15. (Appellants') Bond on Appeal.

16. This Designation of Contents of Record on Appeal.

Dated: November 17, 1944.

Respectfully submitted,

F. E. HOFFMANN

and

ARTHUR P. SHAPRO

Attorneys for Appellant, San Mateo Feed & Fuel
Co., a corporation

HUGH F. MULLIN, JR.

and

ERNEST J. TORREGANO

Attorneys for Appellant, H. E. Casey Company, a
copartnership.

[Endorsed]: Filed Nov. 17, 1944. [221]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD ON APPEAL UNDER RULE 75(a)

To the Above Entitled Court, and to C. W. Calbreath, Esq., Clerk of Said Court, and to F. E. Hoffman and Arthur P. Shapro, Esqs., Attorneys for Appellant, San Mateo *Feed & Fuel* Company, and to Hugh F. Mullin, Jr. and Ernest J. Torregano, Esqs., Attorneys for Appellant H. E. Casey Company:

Comes now G. S. Hayward, Trustee of the estate of Joseph Louis Scardino, the Bankrupt above named, Appellee herein, and, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure and designates the following as the portions of the record, [222] proceedings and evidence to be contained in the Record on Appeal notice of which said appeal has heretofore been filed by appellants on the 10th day of November, 1944, as follows:

1. Reporter's Transcript of Examination Under 21(a) which is a portion of Number 6 of Appellant's Designation of Contents of Record on Appeal under Rule 75(a) and which said Reporter's Transcript is a portion of the Record handed up with the Certificate and Report of Referee on Petition for Review of Referee's Order of September 15, 1943;

2. This designation of additional portions of the Record on Appeal dated November 27, 1944.

Respectfully submitted,

MAX H. MARGOLIS

Attorney for Trustee

Receipt of a copy of the foregoing Appellee's Designation of Additional Portions of the Record on Appeal under Rule 75(a) is hereby acknowledged this 27th day of November, 1944.

F. E. HOFFMAN

ARTHUR P. SHAPRO

Attorneys for Appellant, San Mateo Feed and Fuel Co., a corporation

HUGH F. MULLIN, JR.

ERNEST J. TORREGANO

Attorneys for Appellant H. E. Casey Company, a copartnership.

[Endorsed]: Filed Nov. 28, 1944. [223]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 223, inclusive, contain a full, true, and correct transcript of the records

and proceedings in the matter of Joseph Louis Scardino, Bankrupt, No. 34909 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Thirty-two and 40/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of December, A. D. 1944.

[Seal]

C. W. CALBREATH

Clerk

E. H. NORMAN

Deputy Clerk [224]

[Endorsed]: No. 10943. United States Circuit Court of Appeals for the Ninth Circuit. San Mateo Feed & Fuel Company, a corporation, and H. E. Casey Company, a copartnership, Appellants, vs. G. S. Hayward, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt, Appellee. Transcript of record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 15, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10943

SAN MATEO FEED & FUEL CO., a corporation,
and H. E. CASEY COMPANY, a copartner-
ship,

Appellants,

vs.

G. S. HAYWARD, Trustee of the Estate of
JOSEPH LOUIS SCARDINO, Bankrupt,
Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANTS ON
APPEAL UNDER RULE 19(6)

Come now San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartner-ship, Appellants herein, and in accordance with Rule 19(6) of the above-entitled Court specify the following as a concise statement of the points on which said Appellants intend to rely on the Appeal heretofore perfected from the Order made and entered by Hon. A. F. St. Sure, Judge of the United States District Court for the Northern District of California, on the 13th day of October, 1944, and more particularly specified and described in the Notice heretofore filed with the Clerk of said District Court on the 10th day of November, 1944, viz:

That that Order of the District Judge entered on

the 13th day of October, 1944, by which he confirmed and approved the Order of the Referee in Bankruptcy herein made on the 27th day of December, 1943, wherein and whereby Appellants, San Mateo Feed & Fuel Co., a corporation, and H. E. Casey Company, a copartnership, were respectively directed to turn over to Appellee the respective sums of \$1025.35 and \$2534.76 was and is erroneous and contrary to law, in that:

(a) The said Order herein appealed from is not supported by and is contrary to the evidence adduced by Appellants and by Appellee upon the hearing and upon the further hearing of said Appellee's Petition for Turnover Order (filed April 2, 1943).

(b) That the Findings of said Referee contained in his said Order dated December 27, 1943, to wit: Findings numbered (3), (4), (6), (8), (10), (11) and (13) thereof, are not supported by and are contrary to the evidence adduced by Appellants and by said Appellee upon the aforesaid hearing and further hearing of said Trustee's Petition for Turnover Order.

(c) That said Trustee's Petition for Turnover Order (filed April 2, 1943) does not state facts sufficient to warrant the granting by said District Court to Appellee of the relief therein prayed for and/or the relief granted to Appellee by said Referee's Order dated December 27, 1943.

(d) That said Referee improperly received and considered as evidence against Appellants, upon the said hearing and further hearing of said Petition for Turnover Order all of the records of the bank-

ruptcy proceeding, including the Bankrupt's Schedule and the Ex Parte Affidavit filed by the Bankrupt in support of the Trustee's Petition for Review of said Referee's original Order (dated September 15, 1943) made upon said Petition for Turnover Order, in that both said Schedule and said Affidavit were not binding and constituted hearsay as against Appellants.

(e) That all of the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order was insufficient to warrant the District Court in granting to Appellee the relief contained in said Referee's Order dated December 27, 1943.

(f) That the evidence adduced upon said hearing and further hearing upon said Petition for Turnover Order shows affirmatively, and contrary to the Findings of said Referee contained in said Order dated December 27, 1943, that the assignment of said respective sums of \$1025.35 and \$2534.76 to Appellants by the Bankrupt was made more than four months prior to the commencement of said bankruptcy proceedings and was made for a present valuable and adequate consideration; and that even if made within said four months period, said assignment was then made to Appellants for a current valuable and adequate consideration.

(g) That it affirmatively appears from the evidence adduced upon said hearing and further hearing upon said Petition for Turnover Order, and contrary to the Findings of said Referee contained in his said Order dated December 27, 1943, that in

and by the aforesaid assignments of the aggregate sum of \$3560.11 to Appellants said Bankrupt's estate was not depleted to that extent, or at all, and that said assignment did not enable Appellants to secure an undue advantage over other creditors of said Bankrupt of the same class; and more particularly, that Appellants were at all of the times herein mentioned secured rather than unsecured creditors of said Bankrupt.

(h) That it does not appear from the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order, nor is it a fact that at the time of the making of said assignment of said aggregate sum of \$3560.11 to Appellants by said Bankrupt, said Bankrupt was then and there insolvent nor that Appellants, or either of them, then had reasonable cause to believe that said Bankrupt was insolvent.

(i) That it does not appear from the evidence adduced upon the said hearing and further hearing of said Petition for Turnover Order, that the assets in the hands of the Appellee were insufficient to pay in full all of the claims of creditors filed, approved and allowed against said Bankrupt's estate.

Dated at San Francisco, California, this 15th day of December, 1944.

F. E. HOFFMANN

and

ARTHUR P. SHAPRO

Attorneys for Appellant, San Mateo Feed & Fuel Co., a corporation

HUGH F. MULLINS, JR.

and

ERNEST J. TORREGANO

Attorneys for Appellant, H. E. Casey Company, a copartnership.

Receipt of copy of the within document is hereby admitted this 28th day of Dec., 1944.

MAX H. MARGOLIS OK

Attorney for Appellee

[Endorsed]: Filed Dec. 28, 1944. Paul P. O'Brien, Clerk.

